

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

NORMAN BROWN, et al.,)
Plaintiffs,) No. 17-04082-CV-C-NKL
V.) March 27, 2019
ANNE L. PRECYTHE, et al.,) Jefferson City, Missouri
Defendants.) CIVIL

TRANSCRIPT OF EVIDENTIARY HEARING

BEFORE THE HONORABLE NANETTE K. LAUGHREY
UNITED STATES DISTRICT JUDGE

**Proceedings recorded by electronic stenography
Transcript produced by computer**

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1 MARCH 27, 2019

3 THE COURT: Good morning, everyone. Let's go ahead
4 and introduce ourselves. First of all, the representatives for
5 the class?

6 MS. CRANE: Megan Crane, C-r-a-n-e, from MacArthur
7 Justice Center on behalf of the plaintiffs.

8 MS. ZIMMERMAN: Sarah Zimmerman from Husch
9 Blackwell, also on behalf of the plaintiffs.

10 MR. KNEPPER: Matthew Knepper from Husch Blackwell
11 on behalf of plaintiffs. And, Your Honor, we have an extern
12 from MacArthur Justice, Rebecca Bayetti. Would you mind if she
13 sat down here, behind here, to help with documents?

14 THE COURT: That's fine.

15 MR. KNEPPER: Okay. Thank you.

16 MR. SPILLANE: Mike Spillane for the defendants,
17 Your Honor.

18 THE COURT: All right. Welcome to you all. I
19 wanted to again thank Judge Maughmer for the discussions in
20 this matter.

21 I'd like to know from each side what they view the
22 purpose of this hearing is and where we are at in terms of a
23 settlement of this matter. Because I know I have entered an
24 order, a summary judgment order, finding partially in favor of
25 the plaintiff, the class, but -- and I know there's been

1 settlement discussions, Mr. Spillane. But I'm not clear, first
2 of all, whether there is a settlement of anything; and
3 secondly, specifically what the purpose, then, of this hearing
4 is.

5 So I'll let the plaintiff speak first.

6 MS. CRANE: Your Honor, our understanding --

7 THE COURT: You should stand up.

8 MS. CRANE: Yes. I'll come up here for a moment.

9 Our understanding is that we're here today regarding
10 the plans proposed by each party. The plan initially filed by
11 respondents failed to address several key points and key due
12 process violations laid out by your Court's order.

13 As you said, we did go to mediation per Your Honor's
14 order, and I don't want to speak for respondents, but I think
15 we -- both sides found mediation extremely productive. As laid
16 out in defendants' amended proposed plan and in our response to
17 that plan, we reached several points of agreement. Now, you're
18 right, Your Honor, those have not been drafted into a proposed
19 settlement agreement at this stage. I think that is something
20 we are prepared to do and could do, and I believe the amended
21 plan filed by defendants, it to some extent laid that out. All
22 of the points of agreement are what would be in a settlement
23 agreement.

24 I think there are several issues that remain in
25 dispute, and at mediation, the way we were phrasing it at that

1 point were that those were issues we were going to, perhaps,
2 reserve for Your Honor.

3 So plaintiffs' vision of how today will go is that
4 today is to talk about those remaining issues and disputes.
5 And plaintiffs' position is that those issues really aren't
6 just a couple more issues in the list. These are really
7 macro-level issues.

8 THE COURT: We'll get to the argument.

9 MS. CRANE: Okay.

10 THE COURT: Thank you very much. And, Mr. Spillane?

11 I guess, Mr. Spillane, what I want to get a sense
12 of, I'm assuming that, by proposing this plan, you are agreeing
13 to that plan, should you be required to do any plan; is that
14 correct?

15 MR. SPILLANE: I think that to be accurate, Your
16 Honor. I think what we're here for, I think there is no
17 settlement, and because of the issues they mentioned, there's
18 not likely to ever be a settlement. That is, I think they're
19 inflexible on that we must pay for counsel, that we must pay
20 for experts, and that we must have a monitor. My client will
21 never agree to that. So if that's necessary for a settlement,
22 that won't happen.

23 I've given the Court a proposed plan, and my
24 understanding of the law -- and it may be inaccurate, but my
25 understanding of it is if that plan complies with the United

1 States Constitution, this Court could order it, and that would
2 be the end of the case. Because --

3 THE COURT: Well, that could be the end of the case,
4 unless you appeal --

5 MR. SPILLANE: Unless I appeal --

6 THE COURT: -- the Court's original summary judgment
7 order.

8 MR. SPILLANE: If my client wants me to appeal the
9 summary judgment, I will. But that could, then, end the case
10 at this level. So I'm not sure we're here about settlement
11 because I think maybe we're here about whether the plan I
12 proposed complies with the Constitution because I think the
13 case law teaches that the state should be given the first
14 chance to comply; and if it does and this Court finds it does,
15 then I don't think there's anything else to talk about because
16 the case law doesn't permit the other side to micromanage or to
17 get more if our plan is accurate.

18 So I think that's what we're here for today. And as
19 I understand it, they're going to provide an expert that's
20 going to testify, I think, on the three points that we're never
21 going to be agreeing on. And at some point, either before the
22 expert testifies or whenever, I will object, make a *Daubert*
23 objection, because it's basically a law professor who I think
24 is going to tell you how to decide on constitutional issues.
25 But I'll let the Court decide how I should do that.

1 Thank you, Your Honor.

2 THE COURT: Well, I'm not going to decide how you
3 should do what you want to do.

4 MR. SPILLANE: Well, I'll object, Your Honor.

5 THE COURT: All right.

6 MR. SPILLANE: And I think you should hear it as an
7 offer of proof and then decide my objection later, if you think
8 it does pass *Daubert* and have any value.

9 THE COURT: Plaintiff may proceed.

10 MS. CRANE: Thank you, Your Honor. What we propose
11 for today is we give a very brief opening statement -- at this
12 point, I think it will be about two minutes -- that kind of
13 outlines what we expect to present today. And then we have a
14 brief closing argument planned, and I expect respondents would
15 make a closing argument, as well.

16 THE COURT: Okay. You may proceed.

17 MS. CRANE: Thank you, Your Honor. So as I
18 initially said, plaintiffs are cognizant of this Court's order
19 pursuant to *Graham* giving the respondents the first opportunity
20 to explore the mechanisms for compliance in this case. And
21 that's exactly what transpired in this case.

22 As I said, respondents filed an initial plan. They
23 were given that opportunity, but, unfortunately, it failed to
24 address a majority of the specific constitutional violations
25 found by this Court.

1 THE COURT: Do you agree with the defendants'
2 position that if their plan complies with *Miller* that it is
3 sufficient?

4 MS. CRANE: I think if it complies with *Miller* and
5 if it complies with due process, because Your Honor has now
6 found that class members have a due process liberty interest in
7 this parole process, then it is sufficient. Our position,
8 however, is --

9 THE COURT: You understand I've never found that due
10 process limits are defined differently than the Eighth
11 Amendment?

12 MS. CRANE: Than the Eighth Amendment. I understand
13 that, yes.

14 THE COURT: Okay. You may proceed.

15 MS. CRANE: I just want to underscore that there are
16 two constitutional rights now of interest, and I believe the
17 Court has outlined them as having the same scope.

18 Even if that is sufficient, however, the plan
19 currently proposed by defendants does not meet *Miller*, does not
20 meet the Eighth Amendment, and it does not meet due process.

21 As I said, significant progress was made in
22 mediation. I think protections have now been agreed upon to be
23 put in place that makes progress towards a constitutional
24 system, but the issues that remain in dispute and the issues
25 that will be the focus of our expert, Professor Heidi Rummel's,

1 testimony today are foundational and integral to the
2 constitutionality of the entire parole process. Without these
3 protections in place, it is plaintiffs' position that the
4 constitutionality of the other protections implemented will be
5 undermined and perhaps rendered actually meaningless.

6 At the outset, we want to stress that we are only
7 seeking to satisfy due process and the Eighth Amendment here.
8 Nothing more. As respondents just asserted, they claim we are
9 overstepping and we're asking the Court to micromanage the
10 operations of the Department of Corrections, and that is simply
11 not the case. Instead of details of micromanagement, these are
12 macro-level issues that if not implemented will leave in place
13 a piecemeal, hodgepodge plan that leaves unfettered discretion
14 for the board and provides for little to no transparency or
15 accountability. These are critical basic requirements of a
16 due -- of due process, and this cannot be what the Constitution
17 and what *Miller* requires.

18 The only thing that makes these -- the sentences for
19 these 98 men and women constitutional is a meaningful and
20 realistic opportunity for release based upon demonstrated
21 rehabilitation and maturity. Each and every protection we
22 discuss today is necessary and required to fulfilling that
23 constitutional promise.

24 THE COURT: Thank you. Mr. Spillane?

25 MR. SPILLANE: May it please the Court. The first

1 thing I would like to do is make a continuing *Daubert* objection
2 to the testimony today because I don't want to stand up and
3 interfere with it. So if I could have a continuing objection,
4 that would be great.

5 We have a person today who is going to come in, as I
6 understand her report, is going to tell this Court what's
7 constitutional and what's not constitutional. She has no
8 background in child psychology. She has no degree in it. This
9 is a law professor who has an undergraduate degree in English
10 literature, then was a law clerk, then an AUSA, and now is a
11 law professor, who I believe in her report said she's done 50
12 habeas cases, represented 20 AWOL -- JLWOP inmates, and done
13 many parole hearings. No expertise that the Court does not
14 have. And as far as published papers on this or any other
15 subject in the last ten years, the number is zero. As far as
16 testimony as an expert in the last four years, as far as I
17 know, in actual trial, the number is zero, and I think she's
18 done one deposition.

19 So I don't think under *Daubert* there's anything that
20 this expert is qualified to help the Court with. I think she's
21 going to get up and tell the Court what's constitutional and
22 what is not constitutional, and I think the case law teaches
23 that an expert can't do that because it invades the province of
24 the Court. So I would just ask for a continuing objection and
25 the Court to rule on it after the Court has heard the

1 testimony.

2 I think we've provided a very good plan that you've
3 seen that addresses all of the issues. The case law teaches it
4 doesn't have to be a perfect plan. Whatever we draft, someone
5 is always going to be able to find something wrong with it, but
6 it's the board's job to draft the plan and to carry it out to
7 the best of their ability; and if the plan is constitutional, I
8 think that ends the case at this level, Your Honor. Thank you.

9 THE COURT: Thank you. Plaintiff, you may proceed.

10 MS. CRANE: Your Honor, I plan to qualify Professor
11 Heidi Rummel while she's on the stand.

12 THE COURT: Sure.

13 MS. CRANE: Okay. Thank you, Your Honor. So I
14 would like to call Professor Heidi Rummel to the stand.

15 - - -

16 HEIDI RUMMEL,

17 being first duly sworn by the courtroom deputy, testified as
18 follows:

19 - - -

20 DIRECT EXAMINATION

21 By Ms. Crane:

22 Q. Good morning, Professor Rummel.

23 A. Good morning.

24 Q. Would you like some water?

25 A. I'm okay for now. Thank you.

1 Q. Will you please state your full name and spell it for
2 the record?

3 A. Heidi Rummel; H-e-i-d-i, R-u-m-m-e-l.

4 Q. And were you provided -- retained to provide an opinion
5 in this case?

6 A. I was.

7 Q. What was the purpose of that retainer?

8 A. Initially, I was asked to provide an opinion on whether
9 in Missouri Senate Bill 590, coupled with the Missouri Parole
10 Board's practices and procedures provided a meaningful
11 opportunity for release for persons who were sentenced to life
12 without parole for crimes committed under the age of 18.

13 Q. And has the purpose of your retainer evolved since
14 then?

15 A. During the course of the litigation, I was subsequently
16 asked to render an opinion on the defendants' proposed plan
17 following the Court's order and the amended plan on whether the
18 procedures that they set out constituted, or could provide a
19 meaningful opportunity for release for the same class.

20 Q. Are your opinions reflected in a document in this case?

21 A. I did -- initially I drafted a report on the first
22 question, and I subsequently submitted an affidavit on the
23 second question, opining on the defendants' proposed plan.

24 MS. CRANE: And, Your Honor, I'd just like to point
25 out for the record that both of those documents were already

1 filed with this Court as Exhibit 1 to Document 166. And I have
2 them here, if you would like to admit them as exhibits for
3 purposes of this hearing, as well. It would be her expert
4 report, her expert affidavit.

5 THE COURT: Everybody needs to remember that I don't
6 tell you whether I want you to do something. You -- this is an
7 adversarial proceeding. You tell me what you want to do, and
8 then I'll rule on it.

9 MS. CRANE: Okay, thank you. Well, these were filed
10 as Exhibit 1 to Document 166, so they are in the record, and
11 we'll proceed on that basis.

12 BY MS. CRANE:

13 Q. Professor Rummel, have you been paid for your services
14 in this case?

15 A. Yes, I have.

16 Q. How much?

17 A. I have been compensated at a rate of \$500 per hour for
18 my time.

19 Q. And approximately how many hours have you worked on
20 this matter so far?

21 A. Approximately 40 hours, not including my testimony
22 today.

23 Q. And Professor Rummel, I would like to briefly review
24 your qualifications before we get to the substance of your
25 opinions in this case. What is your profession?

1 A. I'm currently a clinical professor of law at the
2 University of Southern California, and I direct the
3 Post-Conviction Justice Project there.

4 Q. And where did you attend law school?

5 A. The University of Chicago.

6 Q. Where have you been admitted to practice?

7 A. In Illinois, the District of Columbia, and California.

8 Q. How long have you practiced law?

9 A. Oh, since 1990. I clerked from '93 to '94; but since
10 1994, about 25 years.

11 Q. How did you start your career as an attorney?

12 A. I spent my first year after law school as a clerk for a
13 federal district court judge in the District of Columbia. And
14 subsequent to that, I was employed -- I worked as an Assistant
15 United States Attorney in the District of Columbia where I
16 handled state court prosecutions. And then for the following
17 ten years, from '96 to the end of 2005, I was an Assistant
18 United States Attorney in the Central District of California
19 where I prosecuted major -- I was in the major crime section,
20 which is violent crime, gang crime, and I was a supervising --
21 I was a deputy chief, supervising new attorneys in our training
22 section and the trial rotation. And subsequent to that, I
23 prosecuted criminal civil rights cases, primarily human
24 trafficking and color of law.

25 Q. How long -- how many years did you spend in U.S.

1 Attorneys' offices in general?

2 A. Twelve.

3 Q. And approximately when did you become a law professor?

4 A. Following -- I left the U.S. Attorney's Office at the
5 end of 2005 and began working at the University of
6 California -- Southern California in 2006.

7 Q. And you mentioned the clinic that you direct at USC.

8 Could you tell the Court a little bit more about that clinic?

9 A. I am not a traditional academic law professor. My
10 primary responsibility, maybe 80 to 85 percent of my time, is
11 running a clinical program where law students -- which predates
12 me at the University of Southern California where law
13 students when I came were almost exclusively representing
14 late-term -- determined late-term inmates who committed first
15 or second degree murder in the California parole process, and
16 then challenging denials of parole, either by the board or the
17 governor, on habeas petitions in initially the state courts and
18 federal court, but eventually the federal court remedy for
19 violation in the context of the California parole process.

20 And then when I came into the project, I began
21 working on the issue shortly -- after I joined the project, I
22 began working on the issue of juvenile life without parole.
23 Initially I was involved in legislative drafting and efforts to
24 pass what eventually became Senate Bill 9, which allowed those
25 persons to seek, in certain cases under certain circumstances,

1 to seek resentencing in court of their life-without-parole
2 sentences.

3 But I continued to be involved in legislative
4 efforts to create the youth offender parole process in
5 California to -- and then representing clients. Through my
6 clinic supervising students, we've represented clients on
7 juvenile-life-without-parole resentencing --

8 COURT REPORTER: Could you please slow down?

9 A. In the past ten years, students in the project have
10 represented persons serving life without parole for juvenile
11 crimes at resentencing hearings on appeal in the California
12 courts of appeal and federal court and at parole hearings in
13 California.

14 Q. And you mentioned the legislative work you've done,
15 specifically in terms of setting up and implementing the youth
16 offender parole process in California. Have you given any
17 legislative testimony related to that work?

18 A. I've testified in front of the legislature several
19 times, both the Senate Public Safety Committee and the Assembly
20 Public Safety Committee, on juvenile life without parole, on
21 youth offender parole, and the parole board process, in front
22 of a budget committee about the parole board process.

23 Q. Have you conducted trainings regarding this legislation
24 that has been implemented, as well as the parole process for
25 juveniles more generally?

1 A. I have. I've done several trainings for the full board
2 in California, which is all the commissioners and chief legal
3 counsel, on youth offender parole. I've also done trainings on
4 intimate partner battering. I've presented training recently
5 to the Forensic Assessment Division of the California Board of
6 Parole Hearings, which is all of the psychologists that conduct
7 the risk assessments for the inmates going through the parole
8 process.

9 I did a training at the Association of Parole -- the
10 APAI, the international paroling association -- I don't know
11 exactly what the letters stand for -- which is commissioners
12 and parole authorities from around the world meet once a year,
13 and we provided training on the youth offender parole process
14 in California at their most recent meeting.

15 I also do trainings for attorneys to conduct parole
16 hearings in California for CLE credit and train them on
17 generally the parole process, and then subsequent to the
18 passage of the youth offender laws, the youth offender parole
19 process.

20 Q. So pulling that all together, Professor Rummel, can you
21 briefly explain to the Court why you are specifically qualified
22 to testify about ways to ensure that the juvenile offender
23 parole process provides a meaningful and realistic opportunity
24 for release?

25 A. You know, in -- in the context of my professional

1 experience, I've conducted hundreds of parole hearings in
2 California where there is a due process liberty interest in
3 parole, both at a time where that -- that -- that due process
4 liberty interest was not being routinely upheld by the parole
5 board, and I've been involved in the reforms that have led to a
6 much more robust -- where that interest has been much more
7 protected by -- through litigation and through legislative
8 change, through regulations. I've been involved in helping to
9 draft and comment on regulations that the parole board has
10 adopted to implement.

11 So I think I'm uniquely situated to understand the
12 dynamics of the parole process and where that process, even
13 where there are certainly protections or policies in place, can
14 fall short of meeting a person's due process liberty interest
15 and/or failing to provide a meaningful opportunity for release.

16 I think my work with persons serving juvenile life
17 without parole and the resentencing hearings I've been through
18 and the experience in the parole process also helps me to
19 understand how the special considerations that need to be
20 given --

21 THE COURT: Slow down.

22 A. How the special considerations and protections afforded
23 by the United States Supreme Court in the *Miller* and the
24 *Montgomery* cases -- how a parole board can uphold those and how
25 a parole board might fall short of those, even in a structure

1 that seems to protect due process liberty interests.

2 MS. CRANE: Your Honor, at this point, I would like
3 to qualify Professor Heidi Rummel as an expert on juvenile
4 offender parole processes.

5 MR. SPILLANE: Your Honor, in case I need to still,
6 I object.

7 THE COURT: All right. I'm going to take it as a
8 continuing objection on all issues that could be raised. And
9 I'm going to go ahead and listen to the testimony, and then
10 maybe a summary at the end as to why you think that I should
11 not consider this for purposes of this hearing. So I will
12 permit you to continue.

13 MS. CRANE: Thank you.

14 THE COURT: Subject to the continuing objection.

15 MS. CRANE: Thank you.

16 THE COURT: I do have a question I'm curious about.
17 You talk about resentencing. Are you talking about
18 resentencing of juveniles without --

19 THE WITNESS: That's correct. In California, we
20 have discretionary juvenile life without parole. If a person
21 is convicted of a special circumstance murder --

22 THE COURT: These are future people who have been
23 sentenced after *Miller*, are you saying?

24 THE WITNESS: No, pre-*Miller*. It's about going back
25 into court post-*Miller*. There are two mechanisms in California

1 for a person to go back for resentencing post-*Miller*. One is
2 to file a *Miller* habeas petition challenging the
3 constitutionality of their sentence; and, too, really there was
4 a presumption in favor of life without parole in California
5 before *Miller*, and in most cases the *Miller* factors weren't
6 presented or considered. So we've represented people on *Miller*
7 habeas resentencings.

8 And we have also -- under the law that passed in
9 California in 2012, it's a statutory remedy, it's not a robust
10 *Miller* hearing, but certain individuals who meet certain
11 criteria had the opportunity to go back into court and present
12 mostly their rehabilitative efforts in an effort to have the
13 court just impose the discretionary 25-to-life sentence and --
14 to vacate the life without and replace it with a 25-to-life
15 sentence.

16 So those are the types of hearings where I've
17 represented individuals.

18 THE COURT: Based on state law.

19 THE WITNESS: Based on -- well the *Miller* habeas
20 would be based on federal law in California. The resentencing
21 under California law would based on state law.

22 THE COURT: All right. Go ahead.

23 BY MS. CRANE:

24 Q. Professor Rummel, just to start off, did you review
25 materials in this case in preparation for your report and your

1 testimony here today?

2 A. I did.

3 Q. Can you briefly summarize those materials for the
4 record?

5 A. Yes. Prior to generating my original report -- and
6 I've listed the materials that I reviewed -- I reviewed the
7 pleadings that had been filed in the case. I reviewed most of
8 the discovery, including decision hearing forms and recordings
9 and summaries of parole hearings for class members, and the
10 other discovery materials that were provided, and the statutes
11 and policies that govern the Missouri parole process.

12 Q. And more recently when these proposed plans and
13 responses by both parties have been filed in this case, have
14 you reviewed all of those documents?

15 A. I did. I reviewed all of the pleadings and proposed
16 plans and responses leading up to today's hearing.

17 Q. And based on your review of all of those materials, in
18 your opinion, does the amended plan most recently proposed by
19 the defendants provide class members due process and a
20 meaningful and realistic opportunity for release?

21 A. In my opinion, it does not provide that.

22 Q. Okay. We will go point by point on your opinion about
23 why it does not.

24 Just as an initial matter, in your affidavit
25 responding to the defendants' initial proposed plan, you stated

1 it was problematic that the defendants' plan requires an inmate
2 to initiate the process. Can you briefly explain why you see
3 that as problematic?

4 A. In my opinion, it's an unnecessary obstacle to
5 obtaining the parole hearing that doesn't really serve any
6 purpose. And in my experience, there are many -- many inmates
7 don't have a full understanding of their legal rights, aren't
8 in a position cognitively, educationally to evaluate whether
9 it's in their best interests to apply for and proceed with a
10 parole hearing and may not apply for a hearing, even though
11 it's in their best interests to do so. Sometimes they're just
12 overwhelmed by the paperwork and the process, and a lack of
13 understanding would lead them to not -- to not apply.

14 Q. Based on your professional experience, what would be a
15 better option?

16 A. Automatic parole consideration at the appropriate time.

17 Q. In your affidavit responding to defendants' initial
18 proposed plan, you referred to the unfettered discretion
19 granted to the board.

20 THE COURT: I'm assuming that whatever you're
21 dealing with in this initial plan wasn't changed in the amended
22 plan.

23 MS. CRANE: Right.

24 THE COURT: Okay.

25 MS. CRANE: And I will make that clear going forward

1 in the questions.

2 THE COURT: Please go ahead.

3 BY MS. CRANE:

4 Q. What is the biggest problem with the board having
5 unfettered discretion?

6 A. In order for release to be meaningful and realistic, in
7 my opinion, there has to be a legal standard. If the board can
8 deny parole for any reason, or any reason other than the crime,
9 or no reason at all, that doesn't provide a meaningful and
10 realistic opportunity for release.

11 Q. And in your opinion, does the amended plan most
12 recently proposed by defendants sufficiently rein in the
13 board's discretion?

14 A. No. It does not.

15 Q. And what is one way, based on your professional
16 experience and expertise, that you would recommend to
17 effectively limit a board's discretion?

18 A. In my opinion, there has to be a legal standard that
19 the -- that the inmate is required to meet in order to be
20 granted parole and that the board has to follow in order for
21 someone to be granted parole that relates to the considerations
22 set forth in *Miller* and *Montgomery*.

23 Q. And what is a legal standard that would relate to those
24 *Miller* considerations and would provide a constitutional
25 process here?

1 A. For example, the irreparable corruption is language
2 that comes directly from those cases which hold that, except in
3 rare cases where someone is determined to be irreparably
4 corrupt, they are constitutionally entitled to an opportunity
5 for release. So one possible standard is, in the absence of
6 irreparable corruption, or an examination of whether someone is
7 irreparably corrupt.

8 THE COURT: Let me make sure I understand. You're
9 saying that you believe that if an inmate shows that they are
10 not irreparably corrupt that they have a constitutional right
11 to be released?

12 THE WITNESS: No, that's one possible legal standard
13 that could be put in place for the board to follow. I don't
14 think it's the only legal standard that would meet
15 constitutional muster.

16 BY MS. CRANE:

17 Q. Is there an alternative that you believe would meet
18 constitutional muster based on your experience?

19 A. Demonstrated maturity and rehabilitation, also language
20 that comes directly from the cases. I think that that is --
21 something closer to that might actually be constitutionally
22 required. That's obviously a question for the Court. But the
23 meaningful opportunity for release based on the case law turns
24 on maturity and rehabilitation, and that is a legal standard
25 that would set a goalpost for the board and for the persons

1 seeking release that, once you demonstrate maturity and
2 rehabilitation, that you would be entitled to be released.

3 Q. And that speaks to my next question. Based on your
4 experience, what impact have you observed a legal standard
5 having on the board and how they conduct hearings and their
6 decision-making?

7 A. The legal standard drives the hearing. It determines
8 what evidence is relevant or not. It provides a framework for
9 evaluating all of the critical factors that *Miller* deems must
10 be considered and that, in fact, the Missouri, you know, law
11 lists as having to be considered. It creates the framework for
12 those factors for consideration, and ultimately it allows
13 someone -- anyone in their reviewing body to determine whether
14 the decision was arbitrary and capricious or not, whether
15 there's evidence sufficient to meet the legal standard or not.

16 Q. And in your professional experience, what benefit, if
17 any, can a legal standard have for the inmates?

18 A. In my experience, inmates take very seriously these
19 parole hearings. When the parole hearing is a full and fair
20 process that can result in release, an inmate -- California has
21 not always been that way, and the shift in that has been really
22 enlightening for me as I've worked with people in prison.

23 When there is a standard, a meaningful standard that
24 can be met and they see other people meeting that standard and
25 going home and the people who don't meet that standard

1 remaining in prison, it gives them a goalpost, it gives them
2 something to work toward. When they leave a hearing and the
3 parole board says, you know, you still don't meet our standard
4 because you need more substance abuse programming, you need to
5 figure out how to manage your anger or need to be more truthful
6 in here, whatever it is they say to them, there's something for
7 them to work toward. It provides an opportunity for them to
8 mature and rehabilitate in a way that I think *Miller* and
9 *Montgomery* envision.

10 So it benefits the hearing process and the fairness
11 of the hearing process and the accountability of the hearing
12 process, and it gives a framework to look and see whether the
13 board has evaluated the factors in a meaningful way leading to
14 the standard. But on the other hand, it also incentivizes and
15 motivates those inmates who can and are interested in -- which
16 is many more than you might imagine, it's been surprising for
17 me in California -- to do the work that they need to do to be
18 able to return to society.

19 Q. Based on your professional experience and your
20 expertise, is a legal standard simply a best practice, or is it
21 a constitutional requirement for *Miller* parole processes?

22 A. I don't believe you can have a meaningful opportunity
23 for release if there's not a legal standard. The board's
24 discretion has to be reined in in some way. There can't be the
25 possibility of denying parole for any reason or no reason.

1 Q. And in your professional opinion, does the amended plan
2 proposed by defendants include an adequate legal standard?

3 A. The only thing I see in that, in their proposed, is one
4 prohibited basis. You know, they can't consider the crime,
5 which I think is appropriate and goes a long way toward getting
6 them where we need -- getting them where they need to be, but
7 it's not the same as having a legal standard.

8 THE COURT: I don't think they said they can't
9 consider the crime, it can't be the sole consideration.

10 THE WITNESS: I'm sorry. I misspoke.

11 BY MS. CRANE:

12 Q. That is correct, the board's proposed plan does,
13 indeed, propose at least one limit on the board's discretion,
14 this prohibition of decisions based solely on the circumstances
15 of the offense. Can you explain a little more about why that
16 isn't a sufficient limit in and of itself without a legal
17 standard also attached to it?

18 A. Even if the crime isn't considered at all, the basis --
19 under the -- under the framework they propose, the basis of the
20 decision can be someone's -- I'm not saying they would do this,
21 but someone's race, where they grew up, criminal conduct they
22 engaged in as a very young person. You know, what they ate for
23 lunch the day before. Those are all bases that they could use
24 to deny parole, and that can't provide a meaningful opportunity
25 for release.

1 Q. In your affidavit, another way you recommended to
2 appropriately limit the board's discretion was documented
3 decision-making or structured decision-making. Can you talk a
4 little bit about why documented decision-making is so important
5 in your professional experience?

6 A. Again, it's the ability of a body to review the reasons
7 for a parole decision to ensure that they are not arbitrary and
8 capricious. If the basis for the decision is not documented
9 somewhere, there's no ability to look back and know whether the
10 board adequately considered the *Miller* factors or used
11 illegitimate bases to make their parole decision.

12 Q. And when you're talking about documenting
13 decision-making, what specifically do you want documented?

14 A. The basis of the decision, the reasons for the
15 decision. The evidence considered and the explanation for the
16 decision.

17 Q. And in your professional experience, is it important
18 for those reasons and the evidence relied upon to be documented
19 related to each *Miller* or statutory factor?

20 A. I think in this case where the case law driving the
21 meaningful opportunity for release requires consideration of
22 those factors, that, yes, it would be important to know how the
23 board evaluated the mitigating factors of youth, the childhood
24 environment, the trauma, adolescent brain development and
25 subsequent growth and maturity in forming its decision to grant

1 or deny parole.

2 Q. And you talked about structured decision-making. What
3 does structured decision-making require?

4 A. That's one way to get to documenting a decision. It's
5 not my opinion that structured decision-making is the only way.
6 We are currently in the process of shifting to structured
7 decision-making in California. I think the benefit it serves
8 is structured decision-making sets out the factors that need to
9 be required and require the decision-maker to cite, here is the
10 evidence that favors that factor, and here is the evidence that
11 disfavors that factor. And so it's a guidepost, it's a
12 framework to understanding how the decision-maker reached its
13 decision.

14 I think it does a couple different things. It gives
15 us the basis to evaluate whether the decision was appropriate
16 or arbitrary and capricious. It gives us -- it gives the
17 decision-maker sort of a framework and a roadmap. It doesn't
18 mean they can't consider other things or ask other questions or
19 think about other things, but it does go a long way to ensuring
20 they're thinking about the right things, at a minimum, and
21 understanding how they weighed the evidence in favor of or
22 against the critical factors that need to be considered in the
23 decision.

24 Q. And in your professional opinion and based on your
25 expertise, is documented decision-making a best practice, or is

1 it constitutionally required for a *Miller* parole process?

2 A. In my opinion, it's critical, it's required that the
3 basis of the decision and the evidence considered is available
4 to be reviewed and is documented in some fashion. It's also a
5 benefit --

6 THE COURT: Tell me why. I mean, we have *Miller*,
7 and it explains to us what's required. How is that required by
8 *Miller*?

9 THE WITNESS: Because if we have no understanding of
10 how the -- if the board just says, we followed *Miller* and here
11 is our decision, there's no way to review that. There's no way
12 to know if that's what they did, if they did it appropriately,
13 if they considered evidence appropriately, if they failed to
14 consider important relevant evidence in making their decision.
15 There's no ability to review that or have any idea whether it
16 was done appropriately or correctly.

17 And due process guards against arbitrary and
18 capricious decision-making. And in a system where it's just a
19 check box yes/no, yes, we considered everything, yes or no,
20 this is our decision, there's no way to ensure that due process
21 was afforded to the person seeking parole.

22 BY MS. CRANE:

23 Q. Another issue that remains somewhat in dispute between
24 the parties and that you address in your report and affidavit
25 is what the Court initially identified as the class members'

1 inadequate access to evidence.

2 In your professional opinion, does the new plan most
3 recently proposed by defendants adequately remedy this problem?

4 A. It goes a long way, but I don't think it completely
5 remedies the issue.

6 Q. And in your professional opinion, what needs to be
7 included in that parole file or in the materials provided to
8 the class member before a hearing?

9 A. In my opinion, any evidence that is part of the record
10 of the decision, any evidence that is considered by the board,
11 can be considered by the board, needs to be available to the
12 person seeking parole and their counsel. And it needs to be
13 provided in a timely fashion with sufficient time to review and
14 digest and understand it and prepare to respond to it.

15 Q. How does this work in California?

16 A. In California, there's a memorandum of understanding
17 between the California Department of Corrections and
18 Rehabilitation and the parole board where a person's entire
19 prison file -- the entire prison file is part of the record for
20 the parole hearing. The parole commissioners have electronic
21 access to the entire prison file and can look at anything in
22 that file when they're asking questions and making their
23 decision. So that entire file is disclosed to inmate counsel
24 at least several months before the hearing, and it's updated at
25 each subsequent parole hearing.

1 Q. And is it updated in the time frame between when it's
2 initially provided to the class member and leading up to the
3 hearing if anything is added?

4 A. Yes. If anything is added to the parole file or -- to
5 the C-file or to the -- there's the prison file, which we call
6 the C-file, and all of that is the record for the parole
7 hearing; but additional documents, such as evidence of the
8 mitigating factors of youth, materials submitted by the
9 district attorneys' offices, letters of support, parole plans,
10 if anything is added to the record for the board's
11 consideration at the hearing, it's provided to the inmate no
12 later than ten days prior to the hearing. And, you know, to
13 me, it's a due process notice and opportunity to be heard
14 requirement.

15 Q. And we talked about access to the prison file and what
16 we here in Missouri call a parole file. What is your opinion
17 about access to statements made by victims or victims'
18 representatives or prosecutors? Is this also required?

19 A. If it's considered -- my opinion is that anything that
20 is considered or presented to the parole board needs to be made
21 available to the inmate and counsel.

22 Now, there's protections. You know, victims
23 obviously have some privacy interests. We would -- you know,
24 personal information, any information that would identify where
25 they live or would allow a person to contact them obviously can

1 be rejected, but the substance of their opinions and their
2 testimony, if it's going to be presented to the decision-maker,
3 needs to also be presented to the person seeking parole so they
4 have an opportunity to respond.

5 Q. And another issue that remains in dispute between the
6 parties and that you addressed in your recent affidavit is that
7 the plan proposed most recently by defendants does not include
8 an official comprehensive policy that would govern this parole
9 process. In your professional opinion, what are the risks or
10 downsides posed by an informal piecemeal policy like that
11 proposed by defendants?

12 A. I mean, I -- it's my opinion you need to have a legal
13 standard, and once you have a legal standard -- or just because
14 the board is tasked with implementing these laws, it's critical
15 that everyone understand how that's going to be done. They can
16 do it however they want that meets due process, but it's
17 critical that those policies be published and that everyone
18 understands how the process will work and what the limits are
19 and what the parameters are so that the rules are set out ahead
20 of time, you know, just to make a fair playing field.

21 And, I mean, typically in my -- in my experience,
22 when an administrative agency is implementing laws, they go
23 through the administrative law process and promulgate
24 regulations that govern their implementation of the law and are
25 subject to public comment. But at some point the process that

1 this decision -- this constitutional right is going to be
2 implemented needs to be set out and provided to all of the
3 people who are -- who are part of the process.

4 Q. You have also expressed concern in both reports about
5 the role that the IPO plays in the Missouri parole process and
6 the impact this has on the constitutionality or the meaningful
7 release for these class members.

8 As an initial question, are you suggesting that the
9 involvement of an IPO, which is an institutional parole
10 officer, in the juvenile offender parole process is, in itself,
11 always unconstitutional?

12 A. No.

13 Q. What is your concern with the specific role the IPO is
14 proposed to play in this *Miller* parole process?

15 A. In my opinion, there are components of the IPO's role
16 that usurp the decision-makers' authority, that infringe on the
17 decision-making process, which is exactly the process that
18 we're -- that needs to have the protections attached to it.
19 The IPO's assessment of the evidence, the IPO's recommendation
20 about the outcome of the hearing, even, to some extent, the IPO
21 making the initial determination of what evidence is relevant
22 to the *Miller* considerations and what evidence may not be
23 relevant to the *Miller* consideration is problematic to me. The
24 fact-gathering, the collecting documents, providing documents
25 to the decision-makers, I don't think there's any

1 constitutional implications with that.

2 Q. So you mentioned infringement on the decision-making
3 authority. In your professional experience, what is the
4 effect, if any, of providing the parole board a recommended
5 decision in advance of a hearing?

6 A. Once -- if a decision-maker is presented with a
7 recommendation, that's going to drive the decision in some --
8 in some way. I mean, more or less, I suppose, with different
9 decision-makers. But when your starting point is this should
10 be a grant or this should be a denial, it's much easier for the
11 decision-maker to shortcut some of the consideration of some of
12 the factors or just to be influenced -- to be influenced by the
13 IPO's recommendation that isn't surrounded by some of the
14 protections that are required for meaningful opportunity for
15 release.

16 Q. Are you also concerned about the fact that the IPO is
17 not present at the actual parole hearing?

18 A. To the extent that the IPO is summarizing -- is
19 reviewing evidence and summarizing it or assessing it or
20 presenting it to the decision-makers, if there's a question of
21 accuracy, if there's a question of information that's been left
22 out, if there's a question of in what context did this
23 information appear, there's no one -- there's no one to answer
24 that at the decision-making process. And, again, all of those
25 things are being done without benefit of counsel, without

1 benefit of the inmate having the opportunity to review all of
2 the evidence before it's presented and respond to it.

3 Q. And given the evidence --

4 THE COURT: Let me stop you. Are you assuming that
5 there's no counsel in any of these cases?

6 THE WITNESS: I know that question hasn't been
7 answered. As you know, my opinion is that there is a right to
8 counsel, there should be a right to counsel, certainly at the
9 hearing process.

10 My concern would be that if the IPO is doing some of
11 the preliminary decision-making processes, that counsel be
12 involved at that point too, I suppose, is what I would suggest.
13 But, yes, yes. I have a big concern about there not being
14 counsel in the process, depending on how the process is
15 structured.

16 THE COURT: So, for example, you were an AUSA. You
17 know that probation makes recommendations to the court. Would
18 you expect that there be counsel involved before they can make
19 that recommendation to the court?

20 THE WITNESS: In federal court in the Central
21 District of California, both the AUSA and the defense attorney
22 have the opportunity to weigh in to the probation officer's
23 report; and if the client was interviewed, counsel would have
24 the opportunity to be present.

25 But, no, certainly counsel doesn't need to draft the

1 report or sign off on the report; but when the report is
2 presented in court, counsel is there to argue about the
3 accuracy, the context of the report, the evidence that was used
4 as the basis of the report, hearsay statements that may be in
5 the report that might not be accurate.

6 And at least when I did sentencing, the probation
7 officer was in court so the Court could say, is it true that
8 this happened or that happened, or what did you base this
9 opinion on, or why do you believe this is an appropriate
10 aggravating sentencing factor, and counsel was there when the
11 probation officer would explain the basis of the report. That
12 seems like a perfectly appropriate process. That's not quite
13 what's set forth yet in the defendants' plan.

14 BY MS. CRANE:

15 Q. And is there a reason, in your professional opinion,
16 given the factors and evidence required in the *Miller* inquiry,
17 that counsel's -- assistance of counsel at the IPO stage might
18 be more necessary in these proceedings than in the typical
19 probation-type interview?

20 A. To the extent that the IPO is collecting evidence of
21 the mitigating factors of youth, which is required to be
22 considered under *Miller*, that's complicated and difficult and
23 requires some very complex legal analysis of what's relevant,
24 what's important, how it -- and how to -- and how to gather it.

25 And in my experience, usually that data collection

1 begins with an interview of the client, who might be very
2 reluctant to expose traumatic childhood experiences or items
3 that -- you know, circumstances that they might believe
4 mitigate against them or hurt them when, in fact, they actually
5 mitigate ultimately at the hearing to provide that information
6 to someone they view as an authority figure or part of the
7 institutional structure. So there's -- so that's a starting
8 point of why it's problematic.

9 But just the task of understanding *Miller*, what it
10 requires, what factors will be relevant to a subsequent
11 determination of someone's growth and maturity is a complicated
12 task for a nonlawyer to accomplish, and I believe that
13 assistance of counsel at that stage would be critical if
14 that's, in fact, what the IPOs are going to be tasked with.

15 Q. And if the IPO were to not provide a recommendation in
16 this process, what role would you envision them playing?

17 A. I mean, I can imagine an IPO collecting evidence,
18 summarizing evidence. You know, like the function of a
19 probation officer, as the Court stated, that makes sense to me.
20 That makes sense to me.

21 But as long as the recommendation can be addressed
22 by counsel, can be discussed with the probation officer, the
23 IPO, at the hearing and the basis of it can be understood, and
24 the records supporting the assessment and opinion are available
25 to the inmate and counsel so that they can present it if

1 there's -- if it's worth presenting a different view or a
2 different context or argument about that evidence, or something
3 is missing from the IPO's report that can be identified by
4 counsel and brought to the attention of the decision-maker.

5 Q. Just briefly, I want to address the use of a risk
6 assessment tool in a *Miller* parole process hearing here in
7 Missouri.

8 In your report, you provided an opinion about the
9 board's proposed use of a risk assessment tool designed for
10 adults and the use of that tool on class members in this case
11 who were all sentenced to prison as juveniles. Can you explain
12 a little more about your professional -- your concern about
13 such a tool, based on your professional experience?

14 A. And this is my professional experience using risk
15 assessments in parole hearings. I don't have a background in
16 risk assessments or psychology.

17 But I think there's two critical things to think
18 about. Whether the risk assessment tool is normed to the
19 population that it's going to be applied to. Most tools are
20 normed for adults. I believe the Ohio tool is normed to
21 adults, so it may be useful in evaluating juvenile offenders,
22 but we don't know until that research is done. And the courts
23 have now told us that juveniles are constitutionally different
24 than adults in meaningful ways relating to culpability and
25 rehabilitation, and so that would be my first concern.

1 And my second concern is that most risk assessment
2 tools aggregate risk based on factors that *Miller* now require
3 to be mitigating. For example, a juvenile -- criminal juvenile
4 history, an unstable childhood or exposure to trauma as a
5 child, you know, and just certain social milestones.
6 Graduation from high school, a driver's license, long-standing
7 employment, marriage, those are factors that can be used in
8 these risk assessment tools to aggregate risk; whereas, *Miller*
9 counsels, I believe, that the fact that someone commits a crime
10 very young and doesn't -- wouldn't have accomplished those
11 things shouldn't be held against them in this context.

12 So that's my other concern about using the standard
13 risk assessment tools that are normed for adults.

14 Q. And --

15 THE COURT: Let me make sure I understand. Are you
16 saying this tool is inconsistent with the requirements of
17 *Miller*?

18 THE WITNESS: I think some of the factors that are
19 used to aggregate risks are inconsistent with the dictates of
20 *Miller*, yes.

21 THE COURT: So you're saying this particular test
22 has factors that aggregate the risks that *Miller* counsels
23 against --

24 THE WITNESS: Correct.

25 THE COURT: -- weighing that heavily, given the

1 youthfulness of the offender.

2 THE WITNESS: Correct.

3 BY MS. CRANE:

4 Q. And you already started to speak to the critical need
5 for counsel in a *Miller* parole process, but let's talk a little
6 bit more about that.

7 Is it your opinion that assistance of counsel is
8 required for a constitutional *Miller* parole process?

9 A. Absolutely.

10 Q. And in your professional opinion and based on your
11 experience, how important is assistance of counsel to
12 guaranteeing that the opportunity for release is meaningful and
13 realistic?

14 A. I believe it's critical.

15 I'm going to ask for the water that was offered
16 earlier now, if I can. Thanks.

17 MR. KNEPPER: May I approach?

18 THE WITNESS: Thank you.

19 BY MS. CRANE:

20 Q. So you were talking about the critical importance of
21 the assistance of counsel. Why do you see it as the most
22 important protection?

23 A. First, based on my experience, effective counsel is the
24 most critical difference in someone being granted or denied
25 parole. And I'm talking now about the population of people who

1 are sufficiently rehabilitated and changed to be -- to qualify
2 for parole. Whether or not you have an effective attorney in
3 the room, preparing you ahead of time, marshaling the evidence
4 in your favor and arguing it to the parole board, and then
5 protecting your rights in the hearing is the biggest difference
6 in the process of granting parole to people who are deserving
7 of it or not.

8 Q. Let's get into a little more detail about those
9 specific functions that you see an attorney playing in these
10 cases. Could you just list some of the specific functions they
11 would be needed to play?

12 A. I think in the context of juvenile-life-without-parole
13 inmates seeking parole, what's one of the most critical is
14 understanding what evidence is relevant to that determination,
15 what evidence is required by the *Miller* and *Montgomery* hearings
16 and obtaining it. Especially 25 years after the fact, that
17 evidence can be very difficult to locate. It's -- they're
18 sensitive topics that the client and the family may not want to
19 openly discuss, and it's a process to collect and be able to
20 present that evidence, and then to understand how that evidence
21 relates to the question of meaningful opportunity for release,
22 maturity and rehabilitation, whatever the standard is, how to
23 present that evidence and how to argue that it -- how it should
24 affect the outcome of the decision-making process are two
25 critical components.

1 Q. What do you see as counsel's role, and why is it
2 important for counsel to also be there to prepare a client for
3 this type of hearing?

4 A. In my experience, there are many people who have
5 sufficiently rehabilitated and changed to be eligible for
6 parole or to be safely released to the community who are not
7 able to navigate the parole process, understand what it
8 requires of them, understand their rights, and just communicate
9 effectively to the board that change and that rehabilitation
10 and to understand the questions, you know.

11 That's even the best and brightest inmates that come
12 in front of the parole board, but it is certainly even more
13 important for many inmates who struggle with intellectual and
14 cognitive ability, undiagnosed learning disabilities, verbal
15 processing disorders, trauma, you know. And we're talking
16 about kids who grew up in prison where discussing trauma is not
17 norm -- the norm, and it's certainly not safe in most contexts.
18 You know, gaining someone's trust, preparing them to be able
19 to -- and just convincing them that you can sit in front of
20 these paroling authorities and talk about childhood abuse or
21 childhood sexual abuse or the things that led you to make the,
22 you know, the most -- the worst choices of your life.

23 So an attorney's ability to understand that, to
24 explain that, to gain someone's trust, and to communicate those
25 important factors to the board in a way that is relevant to

1 their ultimate determination of parole suitability is critical.
2 Just having an advocate, having someone to advocate for you
3 through this process is critical to me. It makes -- it makes
4 more difference than I think almost anything else you can put
5 in place.

6 Q. Speaking of advocacy, does it make a difference to your
7 opinion on this issue that the victims and the prosecutors are
8 a part of the process here in Missouri?

9 A. I mean, it's an adversarial process. I know that it's
10 an administrative process, and, I mean, I think in the best
11 case scenario, you're trying to get to the truth. I mean,
12 everyone in the room is trying to figure out if someone has
13 grown and changed in a way that they're safe to be released to
14 the community, but it's inherently adversarial. In most cases,
15 the district attorney is going to oppose release, and in many
16 cases, the victims -- not in all cases, but in many cases, the
17 victims will oppose release. There's a political interest in
18 not releasing people on parole in most systems, certainly in
19 California.

20 And so it is by nature, to some extent, an
21 adversarial process; and to have a person who grew up in prison
22 alone in the room without an adversary -- without an advocate
23 to protect their rights, explain the process, you know, and
24 make the complex legal arguments that need to be made,
25 especially in these *Miller* cases, is critical.

1 Q. You talked about some of the sensitive information that
2 needs to be presented at these hearings. In your professional
3 experience, is it possible for someone to effectively argue on
4 their own for mitigating evidence and *Miller* evidence within a
5 process that also requires and values a showing of
6 accountability and remorse?

7 A. There is an inherent tension between coming in front of
8 a parole board and taking responsibility for a crime you've
9 committed, especially in those cases where the role -- your
10 role may be more limited, a felony murder case, or just have a
11 more limited role in the case.

12 But in all cases, taking accountability for your
13 crime, demonstrating remorse for your crime and showing you're
14 changed, and also being put in the position of having to
15 protect your legal rights within the framework of the hearing,
16 being able to point out where the board may or may not be
17 following their policies or procedures or protecting your
18 rights, objecting to evidence that may be prejudicial or
19 irrelevant, there's an inherent tension. I don't think a
20 person, especially an inmate who went to prison at 16 or 17
21 years old, can be asked to do that. I don't think most
22 attorneys would be able to do that.

23 THE COURT: What do you mean by protecting your
24 legal rights? This is 25 years after the sentencing.

25 THE WITNESS: I mean, it's difficult to -- for

1 example, in California, we have rules and regulations that
2 govern the parole process. Using someone's innocence against
3 them, asking objectionable questions, introducing irrelevant
4 evidence. You know, there are -- there are certain -- it's a
5 pretty wide open, you know, administrative hearing where lots
6 of things can be asked and done, but there are certain legal
7 rights that someone has. Asking for accommodations for a
8 disability, those types of things. It's very difficult to
9 be -- to --

10 THE COURT: But you were talking specifically in the
11 context of innocence and accountability.

12 THE WITNESS: Well, that's a unique situation, and I
13 think that's especially difficult when someone has maintained
14 innocence for a long time to be -- to be presenting evidence
15 that they're innocent, but also taking accountability in
16 whatever way the board requires it.

17 In California, for example, there's a plausibility
18 standard. If you've maintained innocence or if your account of
19 the offense doesn't match with the official record of the
20 crime, which happens in many, many cases, if your account is
21 plausible, that's sufficient.

22 And there's a lot of legal wrangling about what's
23 plausible or not plausible, especially when the account of the
24 crime many years later is different. You know, I was tried as
25 the shooter, but I wasn't the shooter. And marshaling evidence

1 to demonstrate that's a plausible account, and arguing, you
2 know, those types of things, while still saying, this was the
3 worst decision I ever made, and because I was part of the
4 robbery, I'm still responsible for the murder, but I wasn't the
5 shooter, puts someone in a very difficult position.

6 BY MS. CRANE:

7 Q. You mentioned the need for accommodations for people
8 with a disability or an intellectual disability and the
9 importance assistance of counsel plays there.

10 What disabilities are you speaking of? Are you
11 talking only about people who are diagnosed as intellectually
12 disabled and have an IQ of 70 or below?

13 A. I think any disability that falls within the ADA -- I'm
14 not an expert on the ADA, but there would be physical
15 disabilities, you know, hearing and language and seeing, but I
16 think what's more typical and problematic is undiagnosed
17 learning disorders. I certainly have clients who don't meet
18 the threshold of, you know, MR or their IQ isn't below a
19 certain level, but it's just a little bit above, and the
20 abstract concepts are impossible for them to -- so they need to
21 be asked questions in a certain way. They can ultimately get
22 to where they need to be, but they need to be asked very
23 concrete questions about what happened, how did you feel, how
24 did you respond.

25 Verbal processing disorders are very prevalent. I

1 don't know if there's any testing or evaluation, in California
2 there's none. But the ability to understand the question being
3 asked, to take in information verbally, or to articulate
4 thoughts and ideas verbally. There's a high incidence of
5 verbal processing disorders in prison.

6 So someone who works closely enough with the client
7 to be able to present that and hope the board understands the
8 way questions are --

9 THE COURT: Slow down.

10 THE WITNESS: Sorry. Sorry.

11 A. Just someone with a lower cognitive function, a
12 lower -- compound questions can become very confusing and
13 difficult. And it's my experience that often persons with
14 those challenges present as lying or not credible or minimizing
15 when really there's just a fundamental inability to establish
16 effective communication. And a lawyer who has spent time
17 working with that client and preparing them can point out those
18 problems during a hearing or request the appropriate
19 accommodations so that they can be properly and fairly
20 evaluated by the decision-maker.

21 Q. And you were talking about how an attorney can protect
22 class members' legal rights at a hearing. I just want to
23 circle back on the innocence issue because here in Missouri, by
24 statute, where a class member maintains his or her innocence,
25 by statute, accountability and remorse cannot be required of

1 them.

2 So what could you envision the role an attorney
3 would play in protecting that statutory protection?

4 A. I mean, in my experience when someone does not take
5 responsibility for the crime and maintains their innocence,
6 there is often a series of probing questions by the board, and
7 perhaps rightfully so, trying to determine whether that --
8 they're legitimately maintaining innocence or not. So an
9 attorney can help to protect their rights in that context and
10 to make the legal arguments and remind the board that lack of
11 remorse and accountability cannot be considered, or argue about
12 the interpretation of answers in the context of that
13 questioning.

14 In my experience -- we have a similar standard in
15 California. In my experience, when I present a case where my
16 client is maintaining innocence -- there are not many, but it
17 happens -- it's important for me to present some sort of
18 evidence from the record or make some sort of argument that
19 supports their claim of innocence, point out why the evidence
20 at trial was deficient, or have an affidavit from someone
21 involved in the case, or something else that's required. And,
22 again, that takes an attorney.

23 It's hard to imagine every scenario, but it's a
24 complicated and difficult position to be in to be maintaining
25 innocence in the context of a proceeding that is expecting

1 accountability and remorse.

2 Q. And in general, in your professional experience, have
3 you found that the California boards you've appeared before
4 appreciate having an attorney in the room? Is it helpful to
5 them?

6 A. It honestly is. In my -- the attorney's ability to
7 prepare the client, to answer the questions, to synthesize the
8 materials for the board -- because it's a voluminous record
9 when you're considering the entire prison file, to synthesize
10 what's relevant and important, and even sometimes to organize
11 it or identify it, to -- you know, to contextualize the legal
12 arguments, to present the mitigating youth factors. It often
13 streamlines hearings, and, yes, the commissioners are actually
14 very appreciative, and it's easier to do a hearing with
15 effective counsel in the room than not with effective counsel
16 in the room.

17 Q. I'm going to move on to the importance of expert
18 witnesses in this parole process which you opined on in your
19 reports in this case.

20 We've talked about the need for attorneys, and some
21 of the reasons may be similar here. But why is the ability to
22 retain a psychological expert in addition to counsel so
23 important to this *Miller* parole process?

24 A. In my opinion, the *Miller* factors, the adolescent brain
25 development especially and the impact of trauma in a young

1 person, the child's environment on their ultimate criminal
2 conduct, is -- they're critical to the *Miller* consideration.
3 They are sometimes difficult for a layperson to understand and
4 break down. Even if you can document the adolescent brain
5 development and the trauma, how those two factors impact the
6 criminal decision, and then, again, how someone recovers and
7 rehabilitates and matures from those crime-causing factors are
8 really within the purview of a psychologist, more so than
9 lawyers, and I think it's extremely helpful and critical to a
10 decision-maker who is tasked with considering those factors.

11 Q. In addition to the scientific basis for the *Miller*
12 inquiry and adolescent development, are there cases -- are
13 there specific issues that some cases present that would have
14 an additional reason for needing an expert psychologist?

15 A. I do think there are certain cases, there are certain
16 cognitive/intellectual learning disability challenges that may
17 not be easily understood by a layperson that an expert can test
18 for and explain the impact of and suggest accommodations for.
19 I think there's sometimes complicated mental health diagnoses
20 where an expert can be extremely useful in helping the
21 decision-maker understand the mental health challenges and
22 understand what's going to be necessary in terms of the person
23 addressing the mental health challenges and, you know, putting
24 in place mechanisms for successful reentry to manage mental
25 health challenges. Experts can be helpful -- very helpful in

1 those realms, as well.

2 Q. And in terms of the evidence and factors of --

3 THE COURT: Can you stop for just a minute? I'm
4 trying to put in context this issue of disability.

5 THE WITNESS: Yes.

6 THE COURT: So for the *Miller* factors, disability is
7 really not a factor.

8 THE WITNESS: It can be. Someone with low cognitive
9 function or -- you know, I've had experts tell me that someone
10 who doesn't have abstract thinking or problem-solving skills is
11 much more likely to get caught up in group activity and not be
12 able to understand how to navigate their way out of a quickly
13 developing criminal situation. So it could relate to their
14 culpability for the original commitment offense.

15 THE COURT: But *Miller* is about youthfulness.

16 THE WITNESS: Right. Well, *Miller* is about
17 youthfulness in that the adolescent brain is underdeveloped,
18 recklessness, impulsivity, heedless risk-taking. There are
19 certain diagnoses, ADHD, that aggravate, that accentuate the
20 youth factors. So while they're present maybe -- they're
21 present in every youth, they might be especially amplified in
22 this youth because of ADHD or a history of trauma. Trauma --
23 trauma -- I'm not a psychological expert, but this is what I've
24 learned from working with experts, that trauma stunts brain
25 growth and brain development, it inhibits executive

1 functioning.

2 So sometimes I have clients where my expert will
3 say, he wasn't functioning as a 16- or 17-year-old, he was
4 functioning as a 12-year-old because of these factors in his
5 life that likely stunted his brain growth or additionally
6 inhibited his impulse control or -- you know, I mean, one thing
7 that was surprising to me was when you don't have -- when
8 you're a very concrete thinker, your problem-solving abilities
9 are very limited. So where one child might be in a situation
10 where it's like, let's get a gun, let's go rob here, let's do
11 this, and it's quickly happening, certain individuals could
12 navigate their way out of that if they wanted to not be
13 involved in it or navigate -- and some individuals really have
14 trouble with problem-solving, especially in quickly developing
15 situations.

16 It's important, I think, to the consideration of
17 culpability, and it's important to look at who they are now.
18 Have they put in place mechanisms where they do have impulse
19 control? You know, someone -- have they put in place
20 mechanisms where they're not so susceptible to peer pressure?
21 Or how do they navigate difficult negative peer-influence
22 situations now that they're an adult?

23 And in my experience, the psychological experts in
24 some cases, not all, have been very helpful in flushing that
25 out in ways that none of the laypeople in the room were able to

1 do.

2 BY MS. CRANE:

3 Q. You just spoke about why a disability or diminished
4 cognitive function due to a trauma history is relevant to
5 culpability at the time of the crime, maturity and
6 developmental status at the time of the crime.

7 Would those disabilities or trauma history also be
8 relevant to interpreting a class member's rehabilitation?

9 A. Yes. If they were -- if they were part and parcel --
10 if they were part of the causative factors of the crime or they
11 contributed to the decision to commit a crime, that's something
12 you're definitely going to want to look at on the back end and
13 make sure that it's managed or under control or they've matured
14 past it or they've put in place mechanisms to, you know, be
15 sure it's not going to happen again or it's not going to
16 influence them in the same way as an adult.

17 Q. And why is it not sufficient -- you've spoken to this,
18 but just a more complete explanation of just why is it not
19 sufficient to rely on class members themselves and/or their
20 families to provide the evidence related to the *Miller* inquiry,
21 their childhood experiences, who they were at the time of the
22 crime?

23 A. I mean, I think it's a natural human instinct to
24 protect or hide the most shameful components of our life.
25 There's a lot of shame that surrounds -- I mean, even just

1 illiteracy. I have so many clients where their greatest
2 shame -- they've been sexually abused, they've been physically
3 abused, and their greatest shame is illiteracy.

4 There's a lot of shame, there's a lot of
5 misunderstanding about how these things impacted them, and
6 there's a -- there's an assumption that that's going to hurt
7 them in the parole process. The fact that my dad went to
8 prison or was involved in a gang, which may be the driving
9 reason they made those same decisions, isn't something they're
10 going to want to broadcast. And you need an attorney or a
11 psychologist -- I'm sorry, I'm going -- to explain to them the
12 relevance of it, the importance of it, and gain their trust so
13 that those important considerations can ultimately be presented
14 to the decision-maker, and those aren't things people are
15 openly willing to share. Sometimes they don't even realize
16 that it's outside the norm of what happens in other families.

17 I've spent a lot of time in workshops in groups with
18 inmates in prison, and I say, what is trauma? And they can
19 talk about Vietnam veterans, but they can't talk about the fact
20 that, you know, they got beaten every night when their dad came
21 home high on meth. That doesn't even register for them that
22 that's something that might have influenced their choices and
23 something they need to deal with and process to fully mature
24 and rehabilitate.

25 Q. You just spoke about a class member's fear that this

1 mitigating information pursuant to *Miller* will actually be held
2 against them. And in your reports, you talked about that
3 historically our criminal justice system and our parole system
4 have held *Miller* factors against them as aggravators, they can
5 be viewed as aggravators.

6 Can you talk a little bit about the cultural and
7 mental shift required, based on your experience in California,
8 to shift from viewing these things as aggravators to
9 mitigators?

10 A. In California, prior to the youth offender parole laws
11 and *Miller* decision, an unstable social history was always a
12 major factor mitigating against parole. It's an enumerated
13 unsuitability factor in our regulations. A juvenile criminal
14 history, you know, and things like gang involvement, all, you
15 know, were -- there wasn't -- there was no gray, those always
16 mitigated against suitability for parole and were used to
17 aggregate the prediction of risk.

18 And since the youth offender parole laws have come
19 into play, there's -- it's been a long and slow process, but
20 there's been training in the presentation of this evidence in a
21 different way to the board of parole, and them just hearing
22 people speak about it and speak about the impact of it on their
23 decision-making and how they've used it as a launching board to
24 mature and rehabilitate has been really important, and I think
25 has provided -- the more that cultural shift takes hold, the

1 fuller and fairer the hearings have become, and the greater the
2 ability, I think, of the board to really discern who is
3 suitable to be released and who is not. And who is not.

4 Q. And you just mentioned how critical effective training
5 was to sparking and ensuring the shift happened for the board
6 in California and its staff.

7 Could you just briefly talk about what you think an
8 effective training on these issues would include?

9 A. Yes. I think it's multi-dimensional. Certainly, legal
10 training. Most of the decision-makers are probably not legally
11 trained, so a basic understanding of the laws that govern the
12 *Miller* factors, how they relate to the decision and how
13 policies and procedures must be upheld and implemented. So
14 basic legal training.

15 I think psychological training, an understanding of
16 the science behind the *Miller* decision, adolescent brain
17 development, training on trauma. What is trauma, what does it
18 look like, and what is the impact of trauma? How do people
19 respond to it? How does it drive their decisions, and how do
20 they heal from it? I think training on some of the
21 cognitive/intellectual verbal deficits that people might have
22 when they come to a parole hearing.

23 I would -- I would provide -- I would suggest
24 training -- some of the best training I've done has been
25 bringing former clients who have been through the parole

1 process to talk to commissioners about, here is who I was, very
2 openly and honestly, here's the terrible things I did and the
3 choices I made and why, and here is my process of change.
4 Because understanding how other people have accomplished that
5 process can help you dig into the right questions for
6 evaluating a new person's process of change.

7 I would propose training for -- on victims'
8 experiences in the parole hearing. We do some restorative
9 justice work about -- the parole process can be very
10 traumatizing for victims, and there are things you can put in
11 place to make it less so. And to understand their needs in the
12 parole process, I would suggest having commissioners who have
13 been trained and conducted these hearings participate in that
14 training.

15 But I think the legal, the psychological, and I'm a
16 fan of the restorative justice, protecting victims' rights,
17 too, all being important components of training on how to do
18 these parole hearings.

19 MS. CRANE: Your Honor, before we close Professor
20 Rummel's direct exam, I would just like a moment to confer with
21 counsel, if that's acceptable with Your Honor.

22 THE COURT: Yes.

23 (So done.)

24 MS. CRANE: Thank you very much, Professor Rummel.
25 That's all we have. No further questions.

CROSS-EXAMINATION

3 By Mr. Spillane:

4 Q. Good morning, Professor.

5 A. Good morning.

6 Q. What's your undergraduate degree in?

7 || A. English literature.

8 Q. What did you do after you graduated?

9 A. I went to Japan for a year and taught English.

10 Q. What did you do next?

11 A. I went to law school.

12 Q. Okay. What did you study in law school? Anything
13 about parole or child development or anything like that?

14 A. No, nothing specific. I took criminal law and the
15 typical law school classes.

16 Q. What did you do after law school?

17 A. I clerked in the federal district court in the District
18 of Columbia.

19 Q What kind of cases did you do?

20 A. All cases -- all of the cases that came before that
21 court.

22 Q. No specialty on parole or child development or anything
23 like that?

24 || A

35 0 What did you do after you clerked?

1 A. I went to work for the U.S. Attorney's Office in the
2 District of Columbia.

3 Q. What kind of cases did you do?

4 A. I did misdemeanor cases, simple felony cases, I did
5 grand jury work, and I did appellate work.

6 Q. What did you do when you were done with that?

7 A. I moved to the Central District of California and --
8 (Cross-talking.)

9 Q. What did you do there?

10 COURT REPORTER: For the record --

11 MR. SPILLANE: I'm sorry --

12 COURT REPORTER: -- could you speak one at a time?

13 MR. SPILLANE: I talked over her, I'm sorry.

14 BY MR. SPILLANE:

15 Q. What did you do when you were in the Central District
16 of California?

17 A. I did an -- I did an original trial rotation, I did a
18 grand jury rotation, I worked for several years in the major
19 crimes section prosecuting violent crimes, gang-related crimes,
20 I was a deputy chief in the training, trial rotation section
21 for new attorneys coming into the office, and then I did
22 civil -- criminal civil rights prosecutions until I left.

23 Q. Anything to do with parole?

24 A. I don't believe so, no.

25 Q. There was no --

1 A. No federal parole --

2 Q. That was my --

3 (Cross-talking.)

4 COURT REPORTER: For the record, could you speak one
5 at a time, please?

6 BY MR. SPILLANE:

7 Q. I was going to say, I agree with you now, unless it's a
8 very old grandfathered-in case, there's not going to be federal
9 parole.

10 A. There was no federal parole when I was a U.S. Attorney.

11 Q. What did you do after you finished with the U.S.
12 Attorney's Office?

13 A. I began teaching at the University of Southern
14 California and running the Post-Conviction Justice Project
15 there.

16 Q. What did you teach?

17 A. My main -- my main responsibility was directing the
18 Post-Conviction Justice Project and teaching the seminar that
19 accompanies that clinic. I have also taught legal -- legal
20 analysis of evidence, trial advocacy, criminal law. I taught
21 the -- I had supervised the children's clinic for one year, and
22 I -- for the last two years, I've taught a legislative policy
23 practicum.

24 Q. Let's go back to the children's clinic. Tell me what
25 that was about.

1 A. That was mostly adoptions for foster youth, uncontested
2 adoptions for foster youth, and it was in conjunction with a
3 nonprofit public council in California. There were some
4 special education law cases, some -- so just the -- immigration
5 relief for juveniles. It was a long time ago.

6 Q. On direct examination, you said you conducted, I
7 believe that was your word, parole hearings. Tell me what you
8 meant by that.

9 A. I was the legal representative or supervising the
10 student who was the legal representative at those hearings.

11 Q. So what did you do at the hearings?

12 A. Represented the client. It was their -- an adversarial
13 process where our client is advised of their rights -- well,
14 prior to the hearing, we prepare the client and present
15 evidence, supplement the record as necessary.

16 At the hearing, the majority of questioning is asked
17 by the commissioners. There's a time where the DA asks
18 questions, there's a time where the representative, me or the
19 student, would ask questions, and there's an opportunity for
20 closing arguments.

21 Q. Were those hearings controlled by California statutory
22 law?

23 A. Yes.

24 Q. And California regulations?

25 A. Correct.

1 Q. Tell me what those regulations and laws required as far
2 as the inmate had to show to get out?

3 A. Well, the legal standard for parole in California?

4 Q. Yes, ma'am.

5 A. Is whether the inmate poses an unreasonable risk of
6 current danger to society. There's a presumption in favor of
7 parole in California with a public safety exception in the
8 statute. Subsequently, actually in one of our cases, we filed
9 a writ of habeas corpus because over and over again the parole
10 board was relying on historical factors, such as the commitment
11 offense, to deny parole.

12 We challenged that process in the courts.

13 Ultimately, the California Supreme Court ruled in the *In Re*
14 *Lawrence* case that interpreted the statute as requiring some
15 evidence -- a showing of some evidence of an unreasonable risk
16 of current danger to be able to deny parole. That is generally
17 California's life-with-parole process, that's not specific to
18 the youth offender parole process or persons serving juvenile
19 life without parole.

20 Q. Let's get to that. How many -- did you have any
21 involvement before the parole board, except representing
22 offenders who were asking for parole?

23 A. I'm not sure I understand the question.

24 Q. When you went to the parole hearings, did you ever
25 represent the board, did you ever represent the state?

1 A. No.

2 Q. You were always opposing -- you were always in favor of
3 release?

4 A. I was always representing the inmate seeking parole,
5 yes.

6 Q. Well, when you say representing them, did you ever have
7 a case where you said, gosh, my client doesn't want to get out,
8 doesn't deserve to get out?

9 A. I've had cases where I said I think -- we've had a few
10 cases -- in California, you don't -- typically, a client
11 wouldn't go through with their hearing if they don't believe
12 they have -- they're suitable.

13 I've had many cases where I've advised clients to
14 postpone or stipulate or put their hearing off because I didn't
15 think they were ready for parole. And I've had a few cases
16 where the client insisted on going forward, and our argument
17 was a three-year denial, a minimum denial would be the most
18 appropriate outcome in this case, because it was clear our
19 client wasn't ready, suitable for parole.

20 In the vast majority of people I've taken to the
21 parole board, we have believed that there was -- that they were
22 suitable for parole and have argued for their release.

23 Q. Tell me about representing juvenile-life-without-parole
24 cases before the parole board. How many times have you done
25 that?

1 A. I would say between six and ten. I don't have an exact
2 count. Not very many of our clients are -- have -- they've
3 only recently become parole eligible.

4 I have, however, conducted workshops in California,
5 and I've met nearly every person serving juvenile life without
6 parole in the context of advising them about the new laws that
7 govern their parole eligibility, and have, both supervising
8 students or myself, meeting with them one on one, pursuant to a
9 limited-scope retainer agreement, given them legal advice about
10 how to -- how to prepare themselves for the parole board.

11 Q. Besides representing offenders at parole hearings in
12 general and representing six to ten JLWOP inmates, what gives
13 you -- makes you an expert to opine on the constitutionality of
14 Missouri's parole statute?

15 A. I think I've set forth what I believe are my
16 requirements and my areas of expertise. My experience in the
17 process, my working, you know, on legislation and policies and
18 regulations, and my trainings of the parole board to work
19 toward a full and fair process.

20 Q. Well, let me -- let me ask you this. When you say you
21 worked with the legislature, I'm assuming you lobbied for
22 parole procedures that you considered to be more fair and
23 constitutional?

24 A. Yes, I did. I drafted legislation, worked on
25 amendments with legislators to legislation to create the youth

1 offender parole process, consulted with the Board of Parole
2 Hearings on that legislation to make sure it was agreeable for
3 them and they would support us in the legislative process
4 before the governor. Testified at hearings, met with
5 legislators.

6 But, yes, my position was to lobby and advocate for
7 the creation of a youth offender parole process.

8 Q. You said on direct examination that you trained
9 psychologists. Do you have a degree in psychology?

10 A. I don't. I did one presentation for the Forensic
11 Assessment Division on desistance at their annual --

12 Q. Could you say that word again? I did not understand
13 it.

14 A. Desistance?

15 Q. What's that?

16 A. The opposite of recidivism is my understanding of
17 desistance.

18 Q. So --

19 A. How offenders can -- how people released on parole can
20 be successful in the community.

21 Q. And what did you base that presentation on?

22 A. It was very much, here are our experiences with the
23 parole board. I brought with me former clients, I think two of
24 whom were juvenile-life-without-parole clients, to present on
25 their experiences in the parole board, to talk about the

1 experience of the attorney in assessing their ultimate reports
2 that go to the board, and then the experience of the offender
3 in the parole process.

4 Q. So as -- and correct me if I'm wrong. As I understand
5 it, your expertise is based on your representation before the
6 parole board, your lobbying the legislature, and your teaching
7 classes to folks. Am I missing anything?

8 A. That seems right.

9 Q. But when you taught the classes, the only thing you had
10 to go -- the experience you taught the classes on was the
11 representation before the parole board; is that accurate?

12 A. I mean, I taught them about the laws. I mean, my
13 classes prepared the students to -- to do presentations in
14 front of the board. But, yes, that's the experience it's based
15 on.

16 Q. Okay. On direct examination, you said that you were
17 going to opine on whether there was a due -- due process was
18 satisfied by Missouri parole procedures and whether the
19 offenders had a realistic opportunity at release. Is that
20 accurate?

21 A. I think my opinion today goes to whether the process
22 and procedures presented in Missouri's plan will result in a
23 meaningful and realistic opportunity for release as required by
24 the Constitution and due process. But I think we're saying the
25 same thing.

1 Q. So I think you're opining on whether it -- whether
2 Missouri parole procedures are constitutional. Is that fair?

3 A. And I hope to give from my experience specific examples
4 of where procedures can -- how different procedures can succeed
5 or fail in protecting those constitutional interests.

6 Q. As I understood your direct testimony, you said if
7 there isn't an objective factor that the inmate can meet in
8 order to entitle him to parole, then he doesn't have a
9 meaningful opportunity of release. Is that fair?

10 A. A legal standard. A legal standard, not an objective
11 factor.

12 Q. Tell me what a legal standard is. Help me out.

13 A. I mean, a legal standard -- a legal standard, what -- a
14 legal -- a test, a standard that someone has to meet. A
15 standard that the board has to evaluate in order to make a
16 determination of whether or not to grant or deny parole.

17 Q. If the board is required to give strong consideration
18 to certain factors dealing with rehabilitation and maturation
19 that does not have an objective standard or test, as you've
20 said, do the inmates not have a meaningful opportunity of
21 release?

22 A. If the board can grant -- no matter what the board
23 considers, if the board can grant or deny parole for any reason
24 or no reason, I don't believe that's a meaningful opportunity
25 for release.

1 Q. Tell me what documents you read in this case.

2 A. I've listed them in my report, if I could refer to my
3 report?

4 Q. Certainly, please.

5 A. Do you want me to just read through the list?

6 Q. Well, let me ask you this. Did you read the submission
7 the defendants made about the percentage of offenders who are
8 released on parole in Missouri or conditional release?

9 A. I believe I did.

10 Q. And what was that percentage?

11 THE COURT: Are we talking about juvenile life
12 without --

13 MR. SPILLANE: No, I'm talking about in general,
14 ma'am.

15 A. Oh, in general, how many --

16 BY MR. SPILLANE:

17 Q. Yeah.

18 A. -- are released on parole? I'm not sure -- I don't
19 remember seeing that document.

20 Q. Well, let me give you a hypothetical that roughly 90
21 percent of offenders in Missouri are eventually released either
22 on parole or conditional release and do not complete their
23 sentences, and the board has absolute discretion to grant or
24 deny parole in those cases.

25 Do those offenders not have a meaningful opportunity

1 of release, even when 90 percent of them are released?

2 A. It's possible they do. And it's -- I don't know -- I
3 don't think you can set an exact percentage, if you meet this
4 percentage, then it's a meaningful opportunity for release or
5 not.

6 What I've been asked to opine on is whether these
7 policies and procedures would ensure a meaningful opportunity
8 for release. It's not my testimony that there's no chance
9 anyone would get a meaningful opportunity for release, absent
10 them. I'm giving my opinion about what types of policies and
11 procedures would ensure that someone would receive a meaningful
12 opportunity for release.

13 But I don't know enough about the other -- the
14 release rates or the other inmates in Missouri released on
15 parole to really give an opinion on that.

16 Q. Do you have Document 172 in front of you?

17 A. I do not, unless it's my affidavit or my report.

18 Q. It is not. Let me give you a hypothetical based on
19 Document 172.

20 A. What is Document 172?

21 Q. Document 172 is the plan for compliance with the
22 applicable requirements.

23 A. Is that the amended plan?

24 Q. That is the amended plan.

25 A. I believe I do have that.

1 Q. All right.

2 A. Okay.

3 Q. Does that plan indicate that if either the offender --
4 excuse me, the victim or the prosecutor does not wish to speak
5 in the presence of the offender, their opinions cannot be used
6 for developing the basis of the offense, and the Court must
7 rely -- excuse me. The board must rely on court documents,
8 such as the appellate opinions, or, if the appellate opinions
9 are inadequate, the briefs?

10 A. I believe it does. Can you point to the page so I can
11 just confirm that?

12 Q. Sure. I believe it is --

13 THE COURT: Let me ask you a question.

14 MR. SPILLANE: Yes, ma'am.

15 THE COURT: If that's the case, then why are you --
16 why are they testifying?

17 MR. SPILLANE: Because there's --

18 THE COURT: If the board can't rely on it, then --

19 MR. SPILLANE: Only --

20 THE COURT: -- why are they hearing it?

21 MR. SPILLANE: I will answer, Your Honor.

22 First of all, they have a statutory right to present
23 evidence; but we, as a matter of policy, are going to say that
24 if you will not do it in the inmate's presence, you can have
25 your right, you can say whatever you want, but we won't

1 consider that for the -- for what happened in the offense, we
2 will only look at the court records. Because we're in a
3 statutory bind.

4 THE COURT: So you're going to hear all of this
5 evidence, and then you're going to say, oh, we pretend like we
6 never heard it?

7 MR. SPILLANE: That's exactly right, unless they
8 choose to do it in the inmate's presence. And that's a
9 concession that I would rather not make, but my client has
10 said, you know, we'll do that if they feel that they don't
11 want this to be considered if the -- because we have a problem.
12 We can't -- if the victim doesn't want the inmate to see them
13 when they're coming in there and saying don't parole them, we
14 can't make them do that in the presence of the inmate. But
15 we're saying if you don't do it in the presence of the inmate,
16 we're not going to consider it. So...

17 BY MR. SPILLANE:

18 Q. Go ahead.

19 A. So in California, the victim has the right to appear
20 telephonically. The victim also has a right to appear by
21 videoconference at the parole hearing, which goes a long way to
22 protect them from the trauma of having to sit in the same room
23 as the offender. But they are still able to give their
24 statement, and the person seeking parole is still able to hear
25 it.

1 Would the -- in terms of -- you referred me to the
2 report. Would the victim's statements and the district
3 attorney's argument be done prior to the decision, or would it
4 be done --

5 Q. Yes, ma'am.

6 A. -- post-decision?

7 Q. I think we're looking at Paragraph 14 on Document 172,
8 Page 5.

9 A. I wouldn't have -- I don't think there would be any
10 issue if they're not going to be considering it if the
11 statements were made post-decision.

12 Q. No --

13 A. In my experience, I've been in a lot of hearings where
14 victims speak both in favor of parole and often opposed to
15 parole. It's very powerful testimony. It's very, very
16 powerful testimony. Even the most conscientious decision-maker
17 can have a lot of difficulty putting it completely to the side
18 when they're making a decision, but certainly that -- that
19 would be true of victim statements. In terms of a district
20 attorney's argument, I think clearly there's a right for the --
21 for the person seeking parole to hear the district attorney's
22 argument and respond.

23 Q. All right. I'm going to ask you to look at Document
24 172, Page 20.

25 It says there that the board should consider the 15

1 factors in 558.047 and 565.033, and I'm going to quote now.

2 Pursuant to relevant law, great weight must be given to the
3 inmate's demonstrated rehabilitation --

4 THE COURT: I'm sorry, I'm having trouble finding
5 where you are at. Is this the amended plan?

6 MR. SPILLANE: Yes, ma'am, Document 172, Page 20.
7 I'm looking at this -- there's a big box, and then there's some
8 writing under it. May I continue?

9 THE COURT: Yes.

10 BY MR. SPILLANE:

11 Q. Pursuant to the relevant law, great weight -- and it's
12 in bold -- must be given to the inmate's demonstrated
13 rehabilitation and maturity over time.

14 Is that inadequate?

15 A. Great weight to what consideration, to what decision?

16 Q. Well, then there are 15 factors listed below. You can
17 take a look at them, if you like. They're on Page 20 and 21.
18 Only one of them is the circumstances of the offense.

19 A. Right.

20 Q. And as I took from your testimony on direct, in a
21 sense, the circumstances of the offense are important, at least
22 when they cut in favor of the offender, such as his, perhaps,
23 mental state or being a follower of whatever at the time of the
24 offense.

25 A. I'm not sure I would say important. I think the

1 circumstances of the offense are never irrelevant, and it's
2 always a consideration at the parole hearing. But in my
3 opinion -- in my opinion, understanding why someone committed a
4 crime is critical to two things: understanding whether they've
5 successfully matured and rehabilitated, and to understanding --
6 and to giving a baseline to the growth and maturity. You have
7 to understand where someone was, why they committed the crime
8 and what the circumstances of that were, in order to evaluate
9 those two considerations, their growth and maturity and their
10 rehabilitation.

11 Q. All right. Let's go to the second factor, the degree
12 of the defendant's culpability in light of his or her age and
13 role in the offense. Is that important?

14 A. *Miller* says it is, yes.

15 Q. Okay. And that's one of the things they have to give
16 great weight to, is it not?

17 A. Correct.

18 Q. No. 3 is the defendant's age, maturity, intellectual
19 capacity, and mental and emotional health and development at
20 the time of the offense.

21 A. I've lost you.

22 Q. I'm still -- I'm reading No. 3, right below No. 2 --

23 A. Oh, okay.

24 Q. -- on Page 20. Is that important?

25 A. Yes. *Miller* says it is.

1 Q. No. 4. The defendant's background, including his or
2 her family, home, and community environment. Is that
3 important?

4 A. Yes.

5 Q. Five, the likelihood for rehabilitation of the
6 defendant. Is that important?

7 A. *Miller* says it is, yes.

8 Q. Six, the extent of the defendant's participation in the
9 offense. Is that important?

10 A. I'm not sure exactly what's meant by extent; but, yes,
11 I think the role of the defendant -- the role of the defendant
12 in the offense and understanding the offense is important.

13 Q. Seven, the effect of familia pressure -- excuse me --
14 familial pressure or peer pressure on the defendant's actions.
15 Is that important?

16 A. Yes, I would agree it is.

17 Q. Eight, the nature and extent of the defendant's prior
18 criminal history, including whether the offense was committed
19 by a person with a prior rec -- record of conviction for murder
20 in the first degree or was committed by a person with one or
21 more serious assaultive convictions. Is that important?

22 A. This is one of the factors that I believe *Miller*
23 indicates that -- I mean, in my opinion, in the -- it could be
24 important, but in the context of demonstrating growth,
25 maturity, and rehabilitation, you know, juvenile criminal

1 history is similar to the juvenile commitment offense in the --
2 in the context in which it should be considered.

3 Q. Okay. No. 9, the effect of characteristics
4 attributable to the defendant's youth on the defendant's
5 judgment. Is that important?

6 A. I believe it is, yes.

7 Q. Ten, a statement by the victim or the victim's family
8 member as provided by Section 557.041 until December 31, 2016,
9 and beginning January 1, two thousand -- well, I won't get into
10 the dates, but the statement attributable to the victim or
11 victim's family.

12 A. I appreciate that in Missouri, like in California,
13 there's a due process right for the victim to make that
14 statement, but I don't believe that a victim's statement is
15 relevant to the ultimate determination the board is being asked
16 to make.

17 Q. No. 11, efforts made toward rehabilitation since the
18 offense or offenses occurred, including participation in
19 educational, vocational, or other programs during
20 incarceration, when available. Is that important?

21 A. I believe it is.

22 THE COURT: Could I stop for a minute and go back to
23 No. 10?

24 MR. SPILLANE: Yes, Your Honor.

25 THE COURT: What do you mean by the Court's --

1 ultimate determination the board is being asked to make? Why
2 would a victim's statement not be relevant to the ultimate
3 determination the board is being asked to make?

4 THE WITNESS: Well, again, we don't have a legal
5 standard in place. But if you're speaking about a person's
6 irreparable corruption or demonstrated growth and
7 rehabilitation and maturity, I don't think the impact of the
8 crime on the victim -- while important and significant, and it
9 should be stated at a hearing, but I don't think the impact of
10 the crime is relevant to an evaluation of the person's maturity
11 and rehabilitation.

12 THE COURT: Okay.

13 BY MR. SPILLANE:

14 Q. I'm going to ask you about 12, the subsequent growth
15 and increased maturity of the person since the offense or
16 offenses occurred. Is that important?

17 A. Yes, *Miller* says it is.

18 Q. Thirteen, evidence that the person has accepted
19 accountability for the offense or offenses, except in cases
20 where the person has maintained his or her innocence. Is that
21 important?

22 A. I think less important than some of the other factors,
23 but it can be significant.

24 Q. The person's institutional record during incarceration.
25 Is that important?

1 A. Yes.

2 Q. Sixteen, whether the person remains the same risk to
3 society as he or she did at the time of the initial sentencing.

4 A. I mean, I think that -- to the extent that speaks to a
5 person's growth and rehabilitation and maturity, which I don't
6 know how it wouldn't, I think that is important.

7 Q. Do the 15 factors I just listed go to the maturation
8 and rehabilitation that you believe is dictated for
9 consideration by *Miller* and *Montgomery*?

10 A. Except where I've indicated they don't, yes.

11 Q. Okay. Let's go to Page 24 on Document 172. This is
12 the Juvenile Parole Board Action Sheet. And this, again, says
13 that the board will give great weight to the factors that I've
14 just read; is that accurate?

15 A. It says that the relevant law requires great weight to
16 be given.

17 Q. All right. Let's move on to Page 26 with the heading
18 Final Decision. And then it has a place for writing, and it
19 says above the place for writing, steps the board recommends
20 the offender take to improve their chance for parole in the
21 future. Is that important?

22 A. Yes. You mean is it important that the board --

23 Q. Yes.

24 A. -- give guidance to the offender on what they can do
25 to --

1 Q. Yes.

2 A. -- rehabilitate in a way that will afford them release?

3 Q. Yes.

4 A. Yes, I think that's significant.

5 Q. Let's move on to Page 27, which is titled Juvenile
6 Parole Written Opinion and Decision Notice. There is a space
7 there, which -- above which -- above the space it's entitled,
8 the reasons for this decision, as well as specific evidence
9 supporting each reason, are as follows. Do you see that?

10 A. I do.

11 Q. What's wrong with it?

12 A. I'm not sure I understand the question.

13 Q. That's a good thing that we're telling him the reasons
14 for the decision and the evidence supporting each reason, is it
15 not?

16 A. Yes, absolutely.

17 Q. Is there anything wrong with the way we're doing that?

18 A. As long as every decision-maker is explaining the basis
19 for their decision.

20 Q. I'm going to stop you there and ask you why, as opposed
21 to the board explaining that, why each individual member has to
22 give the reasons for his or her vote.

23 A. I think the decision-makers -- maker or decision-makers
24 need to give the reasons for the decision.

25 Q. Well, if the board as a whole writes that, is that

1 adequate?

2 A. Yeah, if it's a -- if it's a -- yes. The reason for
3 the board's decision needs to be documented is my testimony.

4 Q. Okay.

5 A. And if this accomplishes that, then, yes, that's
6 sufficient.

7 Q. Well -- and in your mind, you're testifying as a legal
8 expert here, is that analogous to a court of appeal where a
9 decision is written by a single judge, but everyone doesn't
10 have to give their individual reasons in the opinion?

11 A. I would say so.

12 MR. SPILLANE: Okay. I don't have any further
13 questions. Thank you.

14 THE WITNESS: Thank you.

15 THE COURT: Let's go ahead and finish up redirect.

16 MS. CRANE: Just one moment, Your Honor.

17 Thank you, Your Honor. I'll be brief. I only have,
18 I think, three to four questions on redirect.

19 - - -

20 REDIRECT EXAMINATION

21 By Ms. Crane:

22 Q. As an initial matter, Professor Rummel, on cross you
23 testified that you have represented six to ten LWOP, juvenile
24 offenders with life without parole applicable hearings; but, in
25 fact, you've also represented many more inmates in the youth

1 offender parole process that you are testifying to here.

2 A. My other juvenile-life-without-parole clients were on
3 the resentencing, in the resentencing process and on appeal of
4 the resentencing. So gathering the mitigation evidence,
5 presenting that to a court at a resentencing hearing, or
6 challenging the reimposition of LWOP on appeal.

7 But I believe only six or eight of my clients --
8 every client I've had who is eligible for the parole process
9 we've taken to the parole board, and -- but I think that's
10 about six or eight.

11 Q. And you have represented other inmates in the parole
12 process, though, in addition to those six to ten LWOP inmates.

13 A. Hundreds, and many who were under 18, and many who are
14 qualified youth offenders on parole in California.

15 Q. On cross, defendants characterized your experience,
16 your relevant experience as essentially only representing these
17 inmates in parole and lobbying. But isn't it true that, in
18 fact, you also trained the California board on how to run and
19 effectuate a constitutional youth offender parole process?

20 A. Yes.

21 Q. And isn't it true that you've also trained parole
22 officials from across the country and the world on the same
23 thing?

24 A. Yes.

25 Q. And isn't it true that you were actually part of

1 drafting the legislation that set up that program and the
2 regulations that implemented it?

3 A. Yes.

4 Q. Defendants walked you through the forms that they
5 proposed in their recently amended plan. And I want to clarify
6 that we actually have not objected to this worksheet that they
7 were walking through point by point, we agree that those
8 factors do speak to *Miller*. What we object to is that they
9 omitted the space for documenting the reasons for their
10 decision on each factor and evidence that they find relevant to
11 each factor.

12 Can you testify again, you did on direct, but why
13 documentation specific to each factor they consider is
14 important?

15 A. I mean, it's very helpful to understand -- later
16 understanding or review of the decision to understand how they
17 weighed the factors, what evidence they considered to make sure
18 it was done appropriately, it wasn't arbitrary and capricious.
19 Whether they do it, you know, after each factor individually,
20 or whether they're conscientious enough to include it all at
21 the end, I don't think it makes a big difference.

22 But it's the -- understanding the basis of the
23 decision and being able to evaluate whether there was actually
24 evidence to support the decision to ensure that it wasn't an
25 arbitrary and capricious decision, that, in my opinion, is

1 critical to the meaningful and realistic opportunity for
2 release.

3 MS. CRANE: Thank you, Professor Rummel. Thank you,
4 Your Honor.

5 MR. SPILLANE: I have a couple of redirect
6 questions.

7 - - -

8 RECROSS-EXAMINATION

9 By Mr. Spillane:

10 Q. Could we go back to Page 27 of 172? Do you see the
11 lines there at the bottom?

12 A. Yes.

13 Q. Could you read the sentence above those lines?

14 A. The reasons for this decision, as well as the specific
15 evidence supporting each reason, are as follows.

16 Q. Is that fine?

17 A. I think reasons for decisions are different than an
18 evaluation of each of the factors. It could be fine, I
19 can't -- it might not be fine, but it could be fine. It's a
20 form.

21 Q. I've heard on redirect that you taught classes, but --
22 and you taught the parole board, but was the experience that
23 you based your teaching on your representation before the
24 parole board?

25 A. In part, yes, and my understanding of the laws and the

1 intention of the laws. But it was legal training, as well as
2 experiential training.

3 Q. So your experience -- so your -- what you taught the
4 classes on was based on -- was your experience representing
5 offenders before the parole board and your understanding of the
6 law.

7 A. Yes. Primarily, yes.

8 Q. Anything else?

9 A. Conferences and workshops I attend, but primarily my
10 experience and my legal knowledge.

11 MR. SPILLANE: Thank you.

12 THE COURT: Anything further?

13 MS. CRANE: No further questions, Your Honor.

14 THE COURT: Thank you very much, you may step down.

15 We're going to go ahead and take a break. And so is
16 there any other evidence that you intend to present?

17 MS. CRANE: No, Your Honor.

18 THE COURT: And is there any evidence for the
19 defendant?

20 MR. SPILLANE: No, Your Honor.

21 THE COURT: All right. So then the only thing we
22 have left is closing argument for each side; is that correct?

23 MS. CRANE: That's correct on our end, Your Honor.

24 MR. SPILLANE: Yes, Your Honor.

25 THE COURT: All right. Let's go ahead and take a

1 break. How long do you think the closing argument will take
2 for the plaintiff?

3 MS. ZIMMERMAN: Less than five minutes, Your Honor.

4 THE COURT: Less than five minutes?

5 MR. SPILLANE: That's about as long as I can talk,
6 Your Honor.

7 THE COURT: Okay. Let's be in recess, then, until
8 12:15.

9 MS. CRANE: Thank you, Your Honor.

10 THE COURT: Court's in recess.

11 (A recess was taken from 11:55 a.m. to 12:19 p.m.)

12 THE COURT: We'll begin with the plaintiff.

13 MS. ZIMMERMAN: Thank you, Your Honor. May it
14 please the Court.

15 We just heard an abundance of testimony regarding
16 the reasons that the elements of plaintiffs' plan are not only
17 important, but constitutionally necessary.

18 It's been a long road for these class members. It's
19 been seven years since the United States Supreme Court held in
20 *Miller* that their sentences were unconstitutional. *Miller*
21 changed their lives, providing hope to adults who were sent to
22 die in prison as children. Some of these class members have
23 been serving nearly 40 years with a sentence that has only
24 recently been found unjust.

25 THE COURT: Remind me again how many of these

1 inmates are in the Missouri system that are -- had rights under
2 *Miller*.

3 MS. ZIMMERMAN: I believe the exact count is
4 undetermined, but it is roughly 98 to 100 individuals.

5 THE COURT: Okay. Go ahead.

6 MS. ZIMMERMAN: The process being litigated here
7 today is a remedy for that unconstitutional sentencing.

8 Some states completely abolished life without parole
9 for juveniles. Others have provided resentencings with all the
10 constitutional rights --

11 COURT REPORTER: Could you please speak up? I'm
12 having a hard time...

13 THE COURT: You might bring that microphone a little
14 closer.

15 MS. ZIMMERMAN: Is that better?

16 THE COURT: That's better.

17 MS. ZIMMERMAN: Perfect. Probably need to lower it.

18 Missouri opted to attempt to satisfy *Miller* through
19 a parole process. That does not mean that the class members'
20 due process rights and entitlement to a meaningful and
21 realistic opportunity for release can be waved aside.

22 What we're asking for is straightforward. We are
23 asking for the minimum requirements under the Constitution to
24 ensure a consistent, transparent, and enduring process in which
25 the factors for the class members' youth, maturity, and

1 rehabilitation can be thoughtfully considered by the parole
2 board.

3 We have been reasonable and compromised where we
4 can, but in light of our role as class counsel, we are required
5 to ensure that the remedy put in place for each class member,
6 whether entitled to a hearing tomorrow or in 15 years, is
7 ensured protections that make sure he has -- he or she has a
8 meaningful and realistic opportunity for release.

9 While there are elements of defendants' plan that
10 are adequate and meet that constitutional requirement, without
11 more, those pieces will fall flat. While Mr. Spillane said
12 that the defendants' plan does not need to be perfect, and we
13 don't believe that it does, it does need to, as a whole,
14 provide a process that is constitutional.

15 We have reached a point where we can no longer
16 compromise. A right to counsel, comprehensive written
17 policies, and a legal standard, to name a few, are essential to
18 meet that constitutional minimum requirement.

19 THE COURT: Tell me why -- I'm assuming you're
20 saying a right to counsel that is paid for by the state.

21 MS. ZIMMERMAN: Yes, Your Honor.

22 THE COURT: There's no indication here that the
23 state is going to deny somebody having a lawyer represent them
24 in the parole process, is there?

25 MS. ZIMMERMAN: No. We do believe that these

1 individuals are entitled to have a constitutional right to
2 counsel. While if they can afford one, they can certainly
3 receive one, and we agree that defendants are not saying that
4 counsel will not be welcome at hearings.

5 However, if you have a right to counsel, and we
6 believe that counsel is instrumental in ensuring that the due
7 process rights for these individuals are met --

8 THE COURT: I guess, though, what I'm trying to
9 understand, what are you saying they must do to meet that
10 requirement that you've identified? Give an attorney and pay
11 for it?

12 MS. ZIMMERMAN: In the event that an individual
13 cannot afford one, yes, Your Honor.

14 THE COURT: Okay. And why is that?

15 MS. ZIMMERMAN: We believe that, per your order, one
16 of the deficiencies found in the parole process was the
17 inability and lack of the ability for class members to advocate
18 for their positions. It's plaintiffs' position that an
19 attorney is instrumental in being able to present evidence to
20 the board, provide -- present -- make legal arguments to the
21 board in a way that ensures that the *Miller* factors are being
22 appropriately considered.

23 THE COURT: Okay. And so if they can't afford one,
24 the state still has to pay for it. There's not a system by
25 which the MacArthur Foundation or the bar or some other

1 organization commits to, in fact, provide that legal
2 representation for them. They're not being denied the right to
3 have an attorney present.

4 MS. ZIMMERMAN: Understood. And our greatest
5 concern with having an organization like you suggest commit to
6 provide that counsel is that we are talking about a prolonged
7 process. It is not that individuals will only be in front of
8 the parole board in the coming year or couple of years. But a
9 system needs to be in place and a process where someone in 15
10 years who is in front of the parole board is ensured that
11 mechanism, that right to counsel, and we think that the only
12 way to do that is through the state.

13 THE COURT: Okay. Go ahead.

14 MS. ZIMMERMAN: As I started to mention, your
15 summary judgment order highlighted some specific deficiencies
16 in the state's parole process. The elements in plaintiffs'
17 compliance plan and articulated by Professor Rummel today
18 specifically addressed the concerns raised by this Court.

19 For example, your order pointed out that the
20 deprivation of a spokesperson who can advocate on behalf of the
21 class member results in a lack of meaningful opportunity as
22 required by law. As I just mentioned, it's plaintiffs'
23 position that counsel is the fundamental advocate for class
24 members being able to present evidence and legal arguments to
25 the parole board.

1 Similarly, an expert is key to being able -- for the
2 class members' ability to demonstrate their maturity and
3 rehabilitation on complex and scientific factors.

4 This Court also found that the process lacked
5 objective criteria. Requiring the use of a legal standard
6 ensures that the parole board does not have unfettered
7 discretion.

8 THE COURT: Well, I'm a little confused on that.
9 There is a legal standard, and that's *Miller*. They're not
10 entitled to anything more than what *Miller* provides, are they?

11 MS. ZIMMERMAN: And that's why the legal standard
12 that we have requested is directly drawn from the language of
13 *Miller*. We would just, I suppose, recommend a formal legal
14 standard within the policy and procedures of the process.

15 THE COURT: Mr. Spillane went through the form, and
16 that form identifies, I believe, what the *Miller* standards are.
17 I'm assuming that's going to be his argument. Why isn't that
18 the legal standard that has to be met?

19 MS. ZIMMERMAN: I believe that the --

20 THE COURT: I mean, there's lots of legal standards.
21 When I enter -- when I consider evidence, I have a standard
22 that, a legal standard that I have to take into account in
23 deciding whether or not to admit evidence. But I also have
24 discretion because there are certain areas of the law that are
25 not just black and white, where there is an element of

1 discretion and appropriate discretion.

2 So why isn't the *Miller* factors the legal standard
3 and discretion an appropriate thing for the -- and I'm not
4 saying appropriate. A constitutional process, which is all I'm
5 here to decide.

6 MS. ZIMMERMAN: Well, I believe that the
7 Constitution does require consideration of the *Miller* factors.
8 The legal standard contributes to assessing the weight each
9 factor should be considered and making a final determination,
10 using the board's discretion in a structured fashion to come to
11 the ultimate conclusion. The legal standard provides that
12 final guidepost of whether or not based on the --

13 THE COURT: What are you saying the legal standard
14 should be?

15 MS. ZIMMERMAN: I believe we are -- we stated in our
16 brief that --

17 MS. CRANE: Your Honor, if I may join counsel to
18 answer questions?

19 THE COURT: No.

20 MS. CRANE: Okay.

21 THE COURT: No, we don't do it that way. She can
22 approach you and ask for assistance or help, but we don't have
23 two people up here at once.

24 MS. ZIMMERMAN: May I ask my co-counsel for a
25 clarification on the legal standard, Your Honor?

1 THE COURT: Yes.

2 MS. ZIMMERMAN: Thank you.

3 (Plaintiffs' counsel conferred privately.)

4 MS. ZIMMERMAN: Your Honor, the legal standard we've
5 proposed is that there is a presumption of release, unless
6 there is some evidence that the individuals are irreparably
7 corrupt, and that language is directly from the case law. From
8 *Montgomery*, I believe.

9 THE COURT: So *Montgomery* is the standard, and
10 you're saying that's what *Montgomery* says.

11 MS. ZIMMERMAN: Yes, Your Honor.

12 THE COURT: Okay. Go ahead.

13 MS. ZIMMERMAN: In addition, ordering the board to
14 articulate its consideration of each factor under *Miller* and
15 SB 590, as we've just discussed, in a written worksheet
16 prevents arbitrary and subjective decision-making.

17 Finally, Your Honor's summary judgment order
18 observed the class members' limited access to information. A
19 clear policy entitling class members to their parole files and
20 all materials that will be considered by the board, including
21 prosecutor and victim statements, remedies this lack of access.

22 THE COURT: Now, what about what the defendant has
23 proposed here, which is, you know, if it turns out that they
24 won't agree to appear or have their testimony reviewed by the
25 counsel for the defendant, that, then, the board can't consider

1 it?

2 MS. ZIMMERMAN: I believe, based on Professor
3 Rummel's testimony, it will be very difficult to unring the
4 bell, if you will. If victims and prosecutors are allowed
5 to -- permitted to make a statement, especially prior to the
6 hearing beginning, and then ask to completely disregard that
7 entire testimony, I do think there could be implications on the
8 weight that that may be given. There are certain protections
9 to help with that, like the structured decision-making we've
10 discussed.

11 THE COURT: What's in your proposal as to how we
12 deal with the security concerns of, certainly the victim or
13 anybody testifying on behalf of the victim?

14 MS. ZIMMERMAN: I think Professor Rummel mentioned
15 some suggestions, like appearing by telephone or other
16 mechanisms, where the victim is shielded from having to be in
17 the presence of the class member.

18 Other options that we have -- that could be
19 considered would be that the attorney for the class member is
20 able to be present during those statements, and, therefore, the
21 privacy concerns are minimized.

22 THE COURT: Okay.

23 MS. ZIMMERMAN: Finally, a written comprehensive
24 policy and a compliance monitor will ensure that these
25 protections remedy the deficiencies identified by this Court

1 and can stand the test of time.

2 Plaintiffs are not seeking to micromanage the state.
3 All of the elements in our plan are directly connected to this
4 Court's order. They are integral for the constitutionality of
5 the process and ensuring that the state provide a meaningful
6 and realistic opportunity for release consistent with the
7 Supreme Court standards.

8 Without a right to counsel or a legal standard, for
9 example, the other protections provided for in the state's plan
10 could be undermined or potentially rendered meaningless. Each
11 and every protection discussed today is required for ensuring
12 the class members' due process and Eighth Amendment rights.

13 Finally, Your Honor, on behalf of the class and the
14 attorneys at MacArthur Justice Center and Husch Blackwell, we
15 really do appreciate the opportunity to appear and present
16 evidence. We believe that the plan and conclusions presented
17 here today and discussed are what's minimally necessary to meet
18 the constitutional requirements and our obligations as class
19 counsel.

20 THE COURT: And the Court is very appreciative to
21 Husch Blackwell, as well as to the MacArthur Center, to provide
22 these services to our legal system so that the adversarial
23 process can work.

24 MS. ZIMMERMAN: Thank you, Your Honor.

25 THE COURT: Before you go, I have a question.

1 MS. ZIMMERMAN: Of course.

2 THE COURT: So you're coming here on behalf of the
3 class members. The prosecutor says you've already got the
4 files for all of these people. What more do you need?

5 MS. ZIMMERMAN: I believe --

6 THE COURT: I mean, access in terms of the files.
7 There's some debate about what you can get from the files and
8 what you can't get from the files.

9 MS. ZIMMERMAN: What we're requesting is a process
10 and a mechanism for providing those files directly to the
11 offenders. The discovery process occurred through litigation.
12 And while I believe we have some files, I don't know that
13 actually we have every single class member's parole file,
14 entire parole file.

15 In addition, as things will go moving forward, there
16 will be additional elements, I think, based on the outcome of
17 this litigation, that will be included in that parole file; and
18 I think having a mechanism in place to share those additional
19 elements and a process by which the class members get access to
20 those files at various times throughout the stages of the
21 parole process is really necessary to their ability to
22 understand what's going to occur in the parole hearing and
23 their ability to digest the evidence that the board will
24 eventually consider.

25 THE COURT: Okay. So you're asking here for a

1 remedy for the class to remedy the existing deficiencies in the
2 process. If the Court enters an order requiring the state to
3 do something and that order is eventually upheld, does that
4 mean that the state now is guaranteed that, in fact, they are
5 complying with *Miller* going forward? In other words, there's
6 not individual challenges that could be made at some future
7 time by these class members because we have litigated here what
8 is, in fact, an appropriate parole hearing under *Miller*?

9 MS. ZIMMERMAN: I believe it's hard to gauge the
10 future litigation. I do think this makes big steps -- as
11 Professor Rummel testified, in California they have seen parole
12 processes and they have experienced instances where on paper
13 something sounded constitutional, but, in practice, it was done
14 differently.

15 I think that the mechanisms that the plaintiffs are
16 asking for go a very long way to ensuring that the
17 constitutional parole hearing is held. However, in practice,
18 things can, I think, always be different. It's hard for me to
19 say with absolute certainty that there would be no future
20 litigation regarding the constitutionality of a particular
21 parole hearing.

22 THE COURT: Okay. Thank you.

23 MS. ZIMMERMAN: Any further questions?

24 THE COURT: Not for me. Thank you.

25 MS. ZIMMERMAN: Thank you.

1 MR. SPILLANE: May it please the Court.

2 The first thing I'm going to spend a few seconds on
3 is I think the *Daubert* motion wins. I think we've heard that
4 the expert witness's expertise is based on defending offenders,
5 including -- the numbers I heard were six to eight and six to
6 ten JLWOP's in parole hearings, and that all of her teaching
7 and lobbying is based on that. I don't think that makes the
8 expert -- excuse me, the proposed expert someone who can tell
9 this Court expert opinions on what's constitutional and what's
10 not, and that was the thrust of her testimony. She's been to
11 law school, she represented people at parole hearings. She's
12 not an expert in any traditional sense.

13 As far as --

14 THE COURT: So you're saying she's not an expert at
15 all, she's not qualified as an expert, and that her -- even if
16 she were, it was not helpful to the Court.

17 MR. SPILLANE: Yes. I'm saying two things: one,
18 she's not qualified as an expert; and, two, it invades the
19 province of the Court to have someone come in and tell the
20 Court what the law is and what the Constitution is. That's why
21 we have judges. That's why we have advocates. I can't go and
22 be an expert on whether the death penalty is constitutional
23 just because I've done a lot of death penalty cases, and I
24 think that's a good analogy. I'm not an expert in the sense
25 that I'm any more qualified than judges to determine how the

1 law applies to the facts, and that's what she's doing.

2 THE COURT: Would you say that your opinions on that
3 might be helpful to the judge?

4 MR. SPILLANE: I don't think so, except in the role
5 of an advocate because I just don't see it being helpful to the
6 judge or any other fact finder, and particularly -- well, the
7 judge particularly has got to judge the law and is presumed to
8 know and follow it. As a matter of law, to have an expert come
9 in and say the law is X, that's the judge's job.

10 THE COURT: Okay.

11 MR. SPILLANE: And, like I said, the other argument
12 is, even if that were something that was proper for expert
13 testimony, which it's not, this is not a qualified expert
14 because she did a few parole cases and then taught a class
15 based on it. Well, probably not a few based in all contexts,
16 but a few doing JLWOP's.

17 I think the plaintiffs agreed when we started that
18 if our proposed procedures are constitutional, that ends the
19 case at this level. Our argument is they are constitutional.
20 The 15 factors coincide with *Miller* --

21 THE COURT: Wait a second, what are you saying?
22 That you're -- before you did any of this work and made these
23 changes, as a matter of law, you believe that your process was
24 constitutional?

25 MR. SPILLANE: I personally did, but --

1 THE COURT: No, your client.

2 MR. SPILLANE: No.

3 THE COURT: Because I'm back to the issue of I'm
4 assuming that your client continues to take the position that
5 they don't need to do any of these things, that their process
6 as they were functioning prior to this lawsuit were
7 constitutional. Is that correct?

8 MR. SPILLANE: That is the position that we have
9 taken.

10 THE COURT: No, is that the position you're taking
11 now? I just want to know what we're deciding here today.

12 MR. SPILLANE: I'm not disavowing the petition in
13 our motion. The legal argument in our motion to dismiss is
14 that our procedures were adequate.

15 THE COURT: That's all I wanted to know.

16 MR. SPILLANE: What I'm talking about now is the new
17 procedures I filed with the Court, the 15 factors in that, the
18 admonition to the board that they must give great weight to
19 those factors, the admonition to the board that they cannot
20 deny based solely on the seriousness of the offense, the
21 forms --

22 THE COURT: Could they deny it 99.9 percent based
23 upon the seriousness of the offense?

24 MR. SPILLANE: Well, prob --

25 THE COURT: And give one tenth of 1 percent to the

1 other factors that *Miller* takes into account?

2 MR. SPILLANE: I believe that to be inconsistent
3 with the direction that the board give great weight to all of
4 the factors. Circumstances of the offense is one factor.

5 THE COURT: Right. But I can give great weight to
6 all of them and then decide there's only one really that
7 requires me to make my decision.

8 MR. SPILLANE: I suppose theoretically you could,
9 and I suppose theoretically the board could do that, but
10 there's no requirement for an objective -- well, I'd better
11 choose my words carefully here.

12 There is no requirement that in every case, if an
13 offender does X, then he's entitled to parole. You can write a
14 parole statute like that. Before 1982, Missouri had a parole
15 statute like that. Now it does not. *Miller* and *Montgomery* do
16 not require it.

17 They require consideration -- well, the summary
18 judgment motion argues that they require in the parole process
19 consideration of maturity and rehabilitation. We certainly do
20 that in our new proposed order, and it's constitutional, and
21 that should end the case at this level.

22 They have no real authority for the proposition that
23 we should hire counsel for all of them. I'm not even sure how
24 we --

25 THE COURT: Right. I'm not talking about that.

1 MR. SPILLANE: Right, yeah, that's --

2 THE COURT: I'm talking about the question as to the
3 legal standard and what the parole board needs to know. I
4 mean, certainly they're going to know that this offender got
5 life without parole.

6 MR. SPILLANE: Yes.

7 THE COURT: So there's already a thumb on the
8 scale --

9 MR. SPILLANE: Yes.

10 THE COURT: -- as to the seriousness of the offense.

11 MR. SPILLANE: Yes.

12 THE COURT: And so if they can give the greatest
13 weight to the seriousness of the offense, then it's probably
14 unlikely that there's going to be any parole granted.

15 MR. SPILLANE: Well --

16 THE COURT: In many cases.

17 MR. SPILLANE: There might be some case out there
18 where they --

19 THE COURT: I understand your statistic about
20 eventually everybody gets parole. But one of the reasons, as
21 you know, is they get old and they get expensive --

22 MR. SPILLANE: Yes.

23 THE COURT: -- and they get paroled.

24 MR. SPILLANE: Right. And --

25 THE COURT: Because we don't want to pay for them.

1 MR. SPILLANE: And I think -- I don't know the
2 correct number, but perhaps -- it's at least four, perhaps
3 four, perhaps five, perhaps more of these JLWOP offenders have
4 already gotten out-dates on their first hearing. But everybody
5 doesn't get an out-date on their first hearing, and they're not
6 entitled to an out-date on the first hearing if the board
7 thinks it's not appropriate.

8 THE COURT: Sure. I understand that. We're looking
9 rather at how they weigh these factors --

10 MR. SPILLANE: Right.

11 THE COURT: -- under the Constitution. I'm
12 struggling with that one myself.

13 MR. SPILLANE: Right. And I'm not sure there's any
14 constitutional dictation in *Miller* and *Montgomery* about how
15 they weigh them. I think they -- you know, if we assume that
16 there isn't a dictate that they consider them, and even if they
17 give them great weight, I think we do that. And can something
18 that has great weight be outweighed by one factor? Possibly.
19 But it doesn't make it unconstitutional.

20 I mean, what they're asking for, and they say it
21 different ways, they're asking for if the offender does X, then
22 he has to be released, and that's not our statute. It used to
23 be our statute, you know, 27 years ago. It's not anymore. The
24 board can still have discretion, as the Court pointed out, just
25 like the Court has discretion.

1 THE COURT: This is slightly different because it's
2 correcting a constitutional violation. That's the problem we
3 have is we're trying to correct a constitutional violation with
4 this remedy. The violation has already occurred. Getting life
5 without parole is a constitutional violation.

6 MR. SPILLANE: Exactly right.

7 THE COURT: We all -- we all can agree on that, so
8 there's already the thumb on the scale. So it's not like every
9 other parolee.

10 MR. SPILLANE: Well, that's right. That's right,
11 but I don't think -- I don't think there's a dictation that --
12 I mean, from what I'm hearing from the other side and what I
13 think I heard from the proposed expert is that you can't
14 consider seriousness of the offense at all.

15 THE COURT: No, that's not what --

16 MR. SPILLANE: And then I think she backed off
17 that --

18 THE COURT: -- they -- I think they became clear
19 here that there was a presumption that if they had X, Y, and Z,
20 then they could get out.

21 MR. SPILLANE: I think that --

22 THE COURT: The presumption is that if they were no
23 longer a threat, that they, you know, were no -- were not
24 incorrigible, that the conduct that they engaged in, while at
25 that time may have indicated that they were corrupt,

1 irrevocably corrupt, that things now have changed, as we
2 understand the development of the brain scientifically, and
3 also we have actual evidence as to whether they are, as an
4 adult, irrevocably corrupt.

5 MR. SPILLANE: Exactly. And I think that's covered
6 by the 15 factors to which the board must give great weight,
7 and I think that's all we can do, without creating an
8 unworkable standard that if they do X, then they're out, and
9 then we can litigate in every case whether or not they did X.
10 The board has got to have some discretion. Because that's what
11 this would be --

12 THE COURT: But no burden shifting.

13 MR. SPILLANE: No, exactly right. It would be a
14 litigation engine. I mean, you saw the cases during the
15 pre-1982 statute where it said shall release if X, and then
16 everybody said they met X when they go to court. And that was
17 a bad statute, and that's why it was replaced. And I think
18 this is better. And what we've produced as a remedy I believe
19 to be constitutional. And I think if it is, then that should
20 end the case at this level, and then my client will tell me
21 whether that's enough or we keep fighting someplace else.

22 THE COURT: I have a question about the access to
23 the files. You have responded that, in fact, they have access
24 to the files because you've already turned it over as part of
25 this litigation.

1 MR. SPILLANE: I think that to be accurate, but I
2 think what they're saying -- and I'm going to ask -- I'm going
3 to turn them around and ask them if I've got this wrong -- is
4 that if they haven't defined everybody in the entire class,
5 there may be somebody out there that they haven't got the file.
6 And if that's true, I mean, I think that's fixable on an
7 individual basis. Is that your concern?

8 MS. CRANE: If I may, Your Honor?

9 THE COURT: Well, just yes or no, and then I'll let
10 them proceed.

11 MS. CRANE: No.

12 THE COURT: Okay. I didn't think so.

13 MS. CRANE: I mean, it's along those lines, but
14 that's not our complete concern.

15 THE COURT: Well, one of my questions is these
16 people aren't going to be -- I mean, one of the problems here
17 in terms of getting the remedy as a class is that I can only do
18 it based on the present. I can't say what's going to happen
19 ten years from now. So I -- whatever I'm doing, I can only do
20 it based upon the information that I have currently in front of
21 me. But, in fact, there are going to be changes in these
22 files.

23 MR. SPILLANE: Yes.

24 THE COURT: In other words, there's some people that
25 maybe will be 15 years out before they are eligible under

1 Miller or under the statute to be considered for parole. And
2 certainly they would have a right, would they not, to their
3 parole file?

4 MR. SPILLANE: I think --

5 THE COURT: I mean, if they had a right as part of
6 this litigation, why wouldn't they have a --

7 MR. SPILLANE: I think if this litigation holds that
8 they have a right, then that right would continue, but it would
9 have whatever redactions this Court put in. And I thought I
10 addressed that someplace, but perhaps I didn't.

11 THE COURT: You may have, but I'm going based
12 upon -- obviously, I've got all of this paper up here. During
13 the oral argument that we've had, that was not addressed.

14 MR. SPILLANE: Yeah, and I -- to be honest with you,
15 I don't remember what I wrote, and it was just earlier this
16 month. But I thought that I would -- I had addressed it. But
17 if I didn't, I don't think that's a hard thing to address that
18 they could have access to --

19 THE COURT: Okay. Let's go ahead, and I'll take a
20 look at it. If there's anything that you want to add, how
21 about if we give you -- the parties a week if they have
22 anything more that they want to provide to the Court.

23 MR. SPILLANE: Right. And I think we talked about
24 this, perhaps, in the IPO context too. And I don't know if
25 that's something the Court is interested in, as well, but --

1 yeah, it's a good thing to have more information from the
2 parole officer, and I don't see that as being a bad thing or
3 something where there's a right to counsel and that you can't
4 have a recommendation from an IPO. More information is better.

5 And what I recall putting in there about the IPO is
6 that they're supposed to help them apply for this process and
7 to make sure that the application gets to the right place, and,
8 if they want them to, to help them get documents about their
9 youth, as far as when they were a juvenile and so forth. So, I
10 mean, I think that's a good thing.

11 But as far as addressing that --

12 THE COURT: But not help them enough to tell them
13 that their time has come to seek parole?

14 MR. SPILLANE: I think we did talk about -- in there
15 about them getting notices. I'm -- I'm digging through this
16 here. Initiation of process. Institutional parole officers
17 will provide class members with a form for requesting a hearing
18 and help ensure completed copies get to the appropriate persons
19 for the process to proceed. So I think I did address that --

20 THE COURT: So a --

21 MR. SPILLANE: -- on Point 4.

22 THE COURT: -- hearing is same as initiating the
23 request for parole?

24 MR. SPILLANE: Initiation of the hearing process was
25 the heading I used there, and what our statute says is that the

1 offender needs to file an application for parole. That's what
2 our law says. So what we have proposed is that the
3 institutional parole officer notifies the offenders, the class
4 members of that, helps them fill out the paperwork, and makes
5 sure it gets to the right place. I'm not sure what else we can
6 do when we've got a requirement that they ask for it.

7 THE COURT: Well, maybe I'm missing something.

8 MR. SPILLANE: Maybe I'm --

9 THE COURT: Are you saying that the IPO is required
10 under your proposal here to notify the offender that it is time
11 for him to initiate a request for parole and that the IPO then
12 will, in fact, provide the necessary forms?

13 MR. SPILLANE: Oh, I think we're doing more than
14 that, so I wasn't very clear. But I will invite the Court to
15 read 4 when it has a chance. But I don't think --

16 THE COURT: I just read it.

17 MR. SPILLANE: Right.

18 THE COURT: It's in front of me.

19 MR. SPILLANE: I don't think what our intention is
20 is that there's some specific days, X number of days before the
21 hearing when the IPO starts helping them get documents. I
22 think it's long before that that they file -- that they give
23 them the notice and --

24 THE COURT: Well, this is --

25 MR. SPILLANE: Maybe I'm not addressing the Court's

1 question.

2 THE COURT: Mike, you probably know more about this
3 than I do. So what I'm trying to get at is there is an
4 eligibility date in the system by which people have a right to
5 apply and get a hearing --

6 MR. SPILLANE: Yes.

7 THE COURT: -- for parole. So what I'm trying to
8 find out is you all know that --

9 MR. SPILLANE: Yes.

10 THE COURT: -- better than the inmate knows that.

11 MR. SPILLANE: Yes.

12 THE COURT: So are you saying that you're agreeing
13 to, for X number of days before that, give them the form
14 notifying them that they now are eligible to seek parole, and
15 then these are the things on your No. 4 that you are going to
16 help them with?

17 MR. SPILLANE: I think that to be accurate, but
18 that's --

19 THE COURT: I've reviewed that, and that doesn't say
20 that.

21 MR. SPILLANE: Yeah.

22 THE COURT: It's certainly ambiguous.

23 MR. SPILLANE: The concept I'm trying to get across
24 is that before they're eligible, if they're eligible five years
25 from now to apply, the IPO can start helping them now get their

1 documents together. There isn't a kick-in date on that.

2 That's what I was trying to convey.

3 And so I think we have a notice requirement here.

4 Let me take a look. I think they get a notice X number of days
5 before the hearing, and, as I understand it, it is a
6 universal -- that everyone is going to get the application, and
7 that is not tied to a particular date, if that makes sense.

8 THE COURT: Well, I'm just trying to -- I'm trying
9 to put myself in the position of somebody who is uneducated and
10 has some issues. How do they know when it's time to be doing
11 this? Because I'm not seeing that. The hearing only comes
12 after, I assume, you apply for parole. There isn't going to be
13 any hearing if nobody applies for parole.

14 And maybe you can -- you know, we can --

15 MR. SPILLANE: Let me see if I can --

16 THE COURT: Let me ask you this. I think this is a
17 better question. Are you saying that there's no objection by
18 the state to, in fact, notify within no less than 60 days
19 before they have a right to file an application for parole? Do
20 you have any objection to that?

21 MR. SPILLANE: No. No.

22 THE COURT: Okay.

23 MR. SPILLANE: And the way I looked at it, I think
24 it's controlled by the last sentence in Paragraph 4, which is
25 probably unclear. The institutional parole officer will

1 provide notice to all class members as listed on a spreadsheet
2 prepared for that purpose.

3 So what I was talking about is they get -- everybody
4 gets notice now, but what the Court is talking about is they
5 want an additional specific notice that kicks in X number of
6 days before the 25 years, and I have no objection to that.

7 THE COURT: Okay. All right. Great. Then what
8 happens if they don't ask for it? Does it continue on
9 indefinitely? So if, you know, at 25 years, they have a right,
10 but they wait until 25 and a half years...

11 MR. SPILLANE: I think that's theoretically possible
12 because what the statute requires is that they make an
13 application, and the procedure that I've written is that
14 everybody gets the application and gets help filling it out and
15 getting it to the right people; but if they say, no, I don't
16 want to be paroled now, I don't want to fill out my
17 application, I'm not sure what we can do.

18 THE COURT: I'm not worried about that.

19 MR. SPILLANE: Yeah, I'm not saying that that's --
20 yeah, everybody gets the application and we help them get it to
21 the right -- maybe there's somebody out there that's not going
22 to apply.

23 THE COURT: Well, I think we're all in agreement
24 that what you're intending here is that there be notice at
25 least 60 days before the deadline, in addition to this notice.

1 MR. SPILLANE: Yeah, because --

2 THE COURT: I know that 25 years from now I probably
3 am not going to remember something that, you know, somebody
4 gave me today. It's possible.

5 MR. SPILLANE: Very good. Does the Court have any
6 other questions? Because I'm sure there's probably a lot of
7 other stuff that --

8 THE COURT: I do.

9 MR. SPILLANE: Good.

10 THE COURT: I do, Mike. Okay. Mr. Spillane.

11 The other issue I've got is this -- the presence of
12 the victim and the prosecuting -- I assume the thing we were
13 discussing is just about the victim, not the prosecutor.
14 You're not suggesting that the prosecutor has a right not to
15 have the offender present while the prosecutor is testifying.

16 MR. SPILLANE: That may be in the Missouri statute,
17 but I'm not sure I feel as strongly about that as I do about
18 the victim. You know, if the Court said that the statute is
19 unconstitutional as to X, if it orders that, I'm not sure. But
20 the victim I really do feel strongly about.

21 THE COURT: And I understand that. What about this?

22 If the attorney is capable of being present -- and I
23 know that that's not the ideal for the plaintiff because there
24 may be things that the client would want to respond to if a
25 victim said a certain thing. But do you have any objection to

1 the attorney being present and being able to --

2 MR. SPILLANE: I don't. But what I will do is I
3 will get on the phone with my client when I get back to my
4 office and say, do you have any objection? And if they do,
5 I'll tell you; and if they don't, let's just assume that I --
6 and let me make sure I understand the question correctly, which
7 is do we have an objection to the attorney being present while
8 the victim --

9 THE COURT: Victim is testifying.

10 MR. SPILLANE: -- is testifying. Yeah, I'm going to
11 have to run that by the client because the client's solution to
12 this was we'll just ignore the testimony. We have a statutory
13 thing that says they have to be able to testify outside the
14 presence, but we just won't take it into consideration. But
15 that may not be a sufficient thing.

16 THE COURT: What is the language of the statute?

17 MR. SPILLANE: I don't have it in front of me.

18 THE COURT: Okay. All right. I'll take a look at
19 that in this process, as well. Because I am -- it is -- you
20 know, it's so fundamental to be able to confront somebody who
21 is testifying and has especially a significant impact, as we
22 all know.

23 MR. SPILLANE: I will be on the phone with my client
24 as soon as I get back to the office and say, is it okay if the
25 lawyer is present? And if we could just do that maybe for the

1 prosecutor and the victim, that -- yeah. I'm trying to avoid
2 an appeal here too.

3 THE COURT: Yes. I appreciate that. Let's see.

4 Give me just a minute here.

5 I know that the plaintiff has asked for four people,
6 and you've agreed --

7 MR. SPILLANE: Yes.

8 THE COURT: -- to four people. But they want there
9 to be a safety valve where for just cause they could request
10 more than four people, as I remember. Is that correct?

11 MR. SPILLANE: I don't have authority to agree to
12 that. That may be one of those things where the exception eats
13 the rule because everybody might want more than -- and who
14 decides what's just cause?

15 THE COURT: I would assume the board would decide.

16 MR. SPILLANE: Right. And then that would be a
17 thought for, perhaps, litigation. I actually needed six. If I
18 can avoid that, I don't want to do it.

19 THE COURT: Yeah, I get it. What about limiting the
20 number of people on both sides?

21 MR. SPILLANE: A better question -- I'm not --
22 that's not a bad question, but I want to make sure I understand
23 the exact question you're asking. Limiting the number of --

24 THE COURT: Yeah. If the defendant only gets four
25 to present their case, does the victim only get four?

1 MR. SPILLANE: And the answer to that is --

2 THE COURT: And I don't mean the victim. I mean the
3 state, effectively, because that's what we're dealing with.

4 MR. SPILLANE: Well, I think there's a statutory
5 definition of victim, and it's not just one person.

6 THE COURT: Right.

7 MR. SPILLANE: So if somebody killed Dad and ten
8 kids want to come in and say bad, I'm not sure statutorily I
9 can stop them. So I guess that's not something I could agree
10 to.

11 THE COURT: Okay. It's not arbitrary as to the
12 victim. Why is it arbitrary as to the defendant?

13 MR. SPILLANE: I guess the answer is I would like to
14 limit the victims if that would solve things, but I can't
15 rewrite the statute, if that makes sense.

16 THE COURT: So why don't we say that, you know, the
17 defendant has a right to four, but no less than the number that
18 the --

19 MR. SPILLANE: Okay.

20 THE COURT: I don't know.

21 MR. SPILLANE: I hope I'm not getting out on a limb
22 on that. If I am, I'll tell you.

23 THE COURT: Yeah.

24 MR. SPILLANE: Let me write that down. Minimum
25 four. Or maximum four, unless...

1 THE COURT: What's the actual -- do you remember the
2 provision of the statute that talks about the right of the
3 victim not to appear in the presence of the plaintiff -- or the
4 defendant?

5 MR. SPILLANE: I don't. I don't. I think it's
6 probably --

7 THE COURT: Because there's always a telephone
8 conference. I know we do that with child molestation cases.

9 MR. SPILLANE: I think it's in Chapter 217
10 someplace, but I'm going to turn around and ask.

11 Does anybody remember the statute on victims?

12 MS. CRANE: I have it here.

13 MR. SPILLANE: Okay.

14 MS. CRANE: I can pull it up, just give me one
15 moment. Rule 217.690 speaks to victims, and then there is --
16 victims' rights at parole hearings. And then there's
17 additionally Statute 595.209, but it's the rights of victims
18 and witnesses.

19 (Counsel conferring.)

20 MS. CRANE: I've highlighted the portion that
21 relates to victims there, and I believe the relevance to
22 victims in that statute, as well.

23 MR. SPILLANE: May I approach?

24 THE COURT: Yes, thank you.

25 MR. SPILLANE: This is yours, Your Honor, if it's

1 helpful.

2 THE COURT: All right.

3 MS. CRANE: In addition, the Missouri Constitution.

4 MR. SPILLANE: Oh, right. It is in the
5 Constitution, as well. May I approach, Your Honor? Here is
6 the provision in the Missouri Constitution, as well.

7 THE COURT: Well, presence is a dubious word. Have
8 they considered telephonic? Because I don't see any way that,
9 you know, you could -- when we decide whether something is
10 admissible or not, if we say it's not admissible, then we don't
11 hear it. In other words, if I had said that this was a witness
12 who is not admissible, whose testimony is not admissible, I
13 would just strike her. And, now, there are some circumstances
14 where I'm having to hear it to decide the question of whether
15 it's admissible or not; but if I already know that some piece
16 of evidence is hearsay or whatever, it's just stricken, we
17 don't hear it.

18 MR. SPILLANE: And that's just something that we
19 came up with, was a way to work around the statute and still
20 not have this evidence come in. So if there's a better answer,
21 I'm not sure --

22 THE COURT: Why not telephonic? We do that for -- I
23 know either video or --

24 MR. SPILLANE: Well, what I'm worried about --

25 THE COURT: -- telephonic testimony by children who

1 have been sexually abused, and we have protection for them.

2 MR. SPILLANE: Is I think the statutory intent with
3 not being in the presence is that the inmate doesn't know that
4 the victim is coming in and saying this is a bad guy, don't
5 parole him, so there's not retaliation. I don't know that if
6 doing that over the telephone solves that problem. At least
7 that's what I'm going to hear from the victims' rights if they
8 decide to sue on this.

9 THE COURT: Let's work on the attorney being
10 present.

11 MR. SPILLANE: I will. It's a call I'll make. I've
12 got two calls -- I mean, I've got two things now: presence of
13 the lawyer during the victim and prosecutor, and maximum of
14 four unless there is a larger number for the victim.

15 THE COURT: All right. Any other issues that you
16 want to address, Mr. Spillane, that I have not brought up yet?

17 MR. SPILLANE: No. I guess this is the wrong time
18 to -- because I think that the prevailing party, if this plays
19 out the way the way it looks like it's going to, and I'm not
20 sure -- it sounded like a whole lot of money for that expert
21 that I'm not sure my client should have to pay for. I mean,
22 \$500 an hour for some huge number of hours that I'm not sure
23 contributed very much.

24 THE COURT: We'll have to address that at a later
25 time.

1 MR. SPILLANE: Yeah. I thought this might not be
2 the right time, but I'm concerned about that.

3 THE COURT: All right. Anything else?

4 MR. SPILLANE: No. Unless the Court has more
5 questions, I'm happy to answer.

6 THE COURT: I don't have any other questions.

7 MR. SPILLANE: Thank you, Your Honor.

8 THE COURT: Theoretically, the last word goes to the
9 party with the burden of proof. Does the petitioner or the
10 class have anything further to say?

11 MS. CRANE: Your Honor, the only thing we would like
12 to respond to is the *Daubert* arguments since we didn't have the
13 opportunity to respond to that previously.

14 THE COURT: Okay.

15 MS. CRANE: And I think it will be brief, 30 seconds
16 to a minute.

17 THE COURT: I love that.

18 MS. CRANE: Unless Your Honor has questions.

19 In terms of Professor Rummel's qualifications, she
20 is amply qualified. Her experience keeps being characterized
21 as simply representing people in the parole process and
22 teaching, but she I think testified repeatedly that it also
23 includes training board parole systems on how to conduct a
24 meaningful parole process that provides a realistic opportunity
25 for release based on the constitutionally required factors.

1 She was also a part of drafting the legislation that created
2 that process and drafting the regulations that implemented that
3 process. So I just think that her expert experience has been
4 mischaracterized thus far.

5 This is a new and evolving landscape because the
6 constitutional law on this issue is relatively new, and
7 Professor Rummel is the most qualified person on this
8 developing topic.

9 Professor Rummel is not opining on the ultimate
10 legal question before the Court. She's not usurping your role.
11 She's opining on a mixed question of fact and law, and what she
12 is really doing is relying on her practical and pragmatic and
13 extensive experience in California of what initially on
14 paper -- as my colleague spoke about, what initially on paper
15 when it was drafted and implemented was believed to meet
16 constitutional requirements, and that in practice, as it played
17 out over the years and was implemented by a board that was
18 experiencing ongoing training and becoming better educated
19 about the requirements, as time went on what did initially meet
20 constitutional muster required reform. That is a question of
21 fact that she is uniquely qualified to, and I believe -- I hope
22 is extremely helpful to this Court. And some of the things
23 that respondent just spoke about underscore why that is
24 helpful.

25 We are not objecting to the forms proposed by

1 respondents. What we are saying is what Professor Rummel could
2 testify to based upon her experience in California is that
3 having something on paper, having forms that list all of the
4 constitutionally required factors doesn't ensure a
5 constitutional process because the question is how are those
6 forms implemented, how are they interpreted. And for us to
7 know that they're done so in a constitutional way requires
8 documented decision-making, it requires documentation on the
9 consideration of each factor, and it requires a formalized
10 legal standard.

11 The legal standard we propose does originate with
12 Supreme Court law, but respondents had represented that why do
13 we need to put that policy -- why do we need to put that
14 language in the policy? Because it's the law. It's governing
15 them, no matter whether we formalize it or not.

16 But based on the extensive discovery in this case
17 and the depositions from board members, IPOs, and parole
18 analysts, they didn't know what *Miller* was, they hadn't read
19 it. And the respondents have revised the forms we proposed to
20 omit both the area for documenting evidence and reasons, and
21 also to omit the guiding language quoted from *Graham* and *Miller*
22 that was included precisely for that purpose.

23 If we're not going to have a codified legal
24 standard, we need to have that guiding language in the forms,
25 because otherwise we don't know that they're just ticking off a

1 box, yes, I've heard the home he grew up in. We don't know
2 what that tick means. Did it mean they considered it
3 mitigating, aggravating, and did they do it in a constitutional
4 way?

5 I believe on all of those points, Professor Rummel's
6 experience of how that played out initially, how it evolved
7 over time, what legislative reform and what litigation was
8 necessary to ensure constitutionality, what that entailed. And
9 the hope is it's not only helpful to this Court, but to
10 judicial efficiency going forward, because we can save Missouri
11 a lot of money and a lot of time by doing it right the first
12 time, and I feel Professor Rummel's testimony here today was
13 instructive on what that requires. Thank you, Your Honor.

14 THE COURT: All right. I'm going to go ahead and
15 take the matter under advisement, and I'll wait to hear if you
16 are going to offer any further amendments, as well as letting
17 the opposing counsel know, as well.

18 MR. SPILLANE: Yes, Your Honor.

19 THE COURT: Thank you.

20 MS. CRANE: Thank you, Your Honor. Very well done
21 to everybody. Are you with Husch also?

22 MS. ZIMMERMAN: Yes.

23 THE COURT: And you are too?

24 UNIDENTIFIED SPEAKER: I thought you were looking at
25 me.

1 MS. CRANE: MacArthur Justice Center intern.

2 THE COURT: I very much appreciate -- you know, it's
3 so important for this process to have lawyers who step up, as
4 I'm sure will be, perhaps, required in the future, as well. So
5 I very much appreciate it. We have a great profession.

6 MR. KNEPPER: Thank you, Your Honor.

7 THE COURT: Court's in recess.

8 (Hearing adjourned.)

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11 CERTIFICATE

12 I certify that the foregoing is a correct transcript
13 from the record of proceedings in the above-entitled matter.

14

15
16 April 2, 2019

17

/s/ _____
18 Kathleen M. Wirt, RDR, CRR
U.S. Court Reporter

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